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| Page | 10, | column 2, | line | 7 from bottom, for "public," read "farming." |
| " | 105, | " | 2, " | 26 from bottom, for "Mrs.," read "Miss." |
| " | 154, | " | 1, " | 12 from top, for "4 N. R.," read "5 N. R." |
| " | 184, | " | 2, " | 23 from top, for "18 Beav.," read "18 Vea." |
| " | 200, | " | 2, " | 13 from top, for "2 De G. & J.," read "1 De G. & J." |
| " | 212, | " | 1, " | 12 from top, for "5 N. R.," read "8 N. R." |
| " | 214, | " | 1, " | 21 from bottom, <i>dele</i> "the." |
| " | 233, | " | 2, " | 26 from top, for "Accountant," read "Attorney." |
| " | 234, | " | 1, " | 17 from top, for "Accountant," read "Attorney." |
| " | 245, | " | 1, " | 17 from bottom, for "power," read "person." |
| " | 246, | " | 2, " | 3 from bottom, for "that is already payable," read "that is not already payable." |
| " | 260, | " | 1, " | 4 from top, for "Sub-Mortgagee," read "Subsequent Mortgagee." |
| " | 268, | " | 2, " | 12 from bottom, for "Ginger," read "Singer." |
| " | 350, | " | 2, " | 29 from bottom, for "in," read "is." |
| " | 399, | " | 1, " | 11 from top, <i>read</i> marginal note thus—"Where a suit commenced by bill was instituted by an executor for administration <i>against his co-executor</i> , and the bill alleged wilful default, and sought consequent relief, and the <i>latter</i> subsequently commenced a second suit," &c. |
| " | 437, | " | 1, " | 15 from top, for "mortgagee," read "mortgagor." |
| " | 432, | " | 1, " | 23 from bottom, <i>dele</i> "to try their right" |
| " | 457, | " | 2, " | 6 from bottom, for "Order XLVI.," read "Order XLII." |
| " | 462, | " | 1, " | 19 from top, for "29 Beav.," read "26 Beav." |
| " | 483, | " | 2, " | 25 from bottom, for "defendants," read "respondents." |
| " | 483, | " | 2, " | 17 from bottom, for "24 Beav.," read "23 Beav." |

ADDENDA.

| | | | | |
|---|------|---|------|---|
| " | 184, | " | 2, " | 8 from bottom, <i>add</i> reference to 1 N. R. 507. |
| " | 459, | " | 2, " | 15 from top, <i>add</i> reference to 2 N. R. 410. |
| " | 459, | " | 2, " | 17 from top, <i>add</i> reference to 1 N. R. 496. |
| " | 459, | " | 2, " | 24 from top, <i>add</i> reference to 4 N. R. 82. |
| " | 474, | " | 1, " | 20 from top, <i>add</i> reference to 2 N. R. 465. |

THE NEW REPORTS.

EQUITY.

Lord Chancellor. } **FOXEN v. FOXEN.**
8 Nov. 1864.

*Will, Construction—Specific Bequest—"Rest"
—Costs.*

Reversal of the decision reported in 3 N. R. 452.

Semble, where a specific fund is given subject to certain charges, such charges and the residue of the fund after defraying such charges, must, in case of a deficiency of the general residue, contribute pari passu to the payment of costs.

This was an appeal from a decision of his Honour Vice-Chancellor Wood, turning on the construction of a will.

The facts sufficiently appear from the report of the argument in the Court below, see 3 N. R. 452.

Freeling and A. E. Miller, for the plaintiff.

W. M. James, Q.C., and Bevir, for the administratrix.

Windle, Hallett, and Martineau, for three of the charities.

Freeling in reply.

THE LORD CHANCELLOR said, that, in the construction of an instrument worded like the present two minds might arrive at a different conclusion, and neither be sure of having discovered the true meaning. It was his duty, however, to put a reasonable construction on the testator's language. Where a word was capable of two distinct meanings, it was a sound rule of construction to take that meaning which was consistent with the whole instrument, and not that which rendered some part unavailing. Inasmuch as the testator followed the gift of certain pecuniary legacies with the words "The rest of my property in the Three per Cent. Consols," &c., it was a reasonable construction to suppose that by the word "rest" the testator intended what should remain after paying the legacies before given; and this view would make the legacies effectual, while a contrary view would defeat them, since there was no other fund able to defray them. He thought, therefore, that the

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Consols were subjected to the legacies in case of need, as well as to the debts and funeral expenses. The decision of the Vice-Chancellor on this point would therefore be reversed, and the decree modified accordingly.

As the testator's property, other than that given to the charities, was insufficient to meet the pecuniary legacies, so that there was no general residue available for costs, some discussion arose as to whether so much of the Consols as remained after satisfying the pecuniary legacies was first to be resorted to for payment of costs, or whether such remainder and the pecuniary legacies were liable *pari passu*. Whereupon

THE LORD CHANCELLOR intimated his opinion that where the residue of a specific fund after defraying specific charges was bequeathed, such residue, and the charges that came out of it, must contribute *pari passu*.

Lords Justices. } **THE COUNTESS OF HARRINGTON v. SIR WILLIAM ATHERTON.**
7 Nov. 1864.

Reversion—Legatee for Life.

In this case (reported in the Court below, 4 N. R. 206, but which does not now call for a lengthened report) the Lords Justices differed from the opinion of the Master of the Rolls, and held that the testator intended his wife to take a life interest in all his personal estate, including a life interest in the capital of the annuity.

Lords Justices. } **COLLINGWOOD v. RUSSELL.**
8 Nov. 1864.

*Charge of Debts—Mortgage by Executor—
Practice—Pleading—Demurrer.*

Semble (Per KNIGHT BRUCE, L.J.), that when the allegations of a bill exhibit such a case as in the opinion of the Court renders it unfit to decide the question without an answer being put in, a demurrer for want of equity should be overruled with a reservation to the defendant of the benefit of the defence at the hearing.

Lord Hardwicke's opinion in Brownsword v. Edwards (2 Ves. 243), followed.

Per KNIGHT BRUCE, L.J., a counsel is not justified in introducing unfounded allegations into a bill merely to avoid a demurrer.

Per TURNER, L.J., the bona fides of sales or mortgages by trustees for the payment of debts is not lightly to be discredited.

This was an appeal from a decision of Vice-Chancellor Stuart, overruling a demurrer.

Matthew Plummer by his will, dated in 1856, after making certain specific devises and bequests, devised and bequeathed to the defendants, Robert Plummer and Matthew Plummer, in equal shares, certain specific legacies, and all the residue of his estate and effects, both real and personal, subject to the payment of an annuity of 400*l.* to his wife Mary Plummer, and of his debts and the costs of proving his will; he appointed the defendants, R. Plummer and M. Plummer, executors of his will, and directed that their receipts should be sufficient discharges for all moneys to be received by them pursuant to his will.

The testator died on the 25th of December, 1856.

In 1859 the plaintiff, on behalf of himself and the other unsatisfied creditors of the testator, instituted a suit to administer the testator's real and personal estate; and, in pursuance of an order made in that suit, the defendants R. Plummer and M. Plummer, as executors and trustees of the testator's will, carried in their accounts, verified by an affidavit, which contained, among the particulars of incumbrances affecting the testator's real estate, the following item:—

"14,000*l.*—A mortgage debt, exclusively of interest due to the trustees of Dr. Russell, being a first charge on testator's freehold land at Byker, by indenture dated the 5th of March, 1857. Note. This mortgage was arranged for by the testator and completed by the executors."

The bill, after stating the above facts, proceeded to allege in effect—

That it did not appear from the account of the rents and profits of the testator, and it was not the fact, that there was in the month of March, 1857, any pressing demand against the testator's estate, and that there was not at that time any necessity for the executors to raise the sum of 14,000*l.*, or any other sum, for the purposes of the estate.

That the mortgage of the 5th of March, 1857, was made between the defendant, R. Plummer, of the first part; the defendant, M. Plummer, of the second part; Mary Plummer of the third part; J. D. Powles (as surety for the payment of the interest on the loan) of the fourth part, and the defendants, Dr. Russell's trustees, of the fifth part, and was a mortgage in fee in the usual form of the Byker Estate to secure 14,000*l.* and interest at 5*l.* per cent., with a proviso for redemption and reconveyance of the mortgaged property to R. Plummer and M. Plummer, their

heirs or assigns as tenants in common, and a power of sale and trust of the ultimate surplus of the sale money for R. Plummer and M. Plummer as tenants in common.

That the indenture of mortgage appeared on the face of it to have been made by the defendants R. Plummer and M. Plummer, as beneficial owners of the mortgaged hereditaments under the devise in the testator's will of the testator's residuary estate to them as tenants in common. That it was not stated in such indenture that the mortgage was made by them as executors of the testator, or to enable them to pay his debts, or otherwise for the purposes of his estate. That the plaintiff had ascertained, and it was the fact, that the sum of 14,000*l.* was not raised for the purposes of the testator's estate, and was not stated to the defendants, Dr. Russell's trustees, to be raised for any such purpose, and that no communication was made to such trustees with respect to the testator's affairs before the mortgage was executed. That Dr. Russell's trustees treated the defendants R. Plummer and M. Plummer as beneficial owners of the mortgaged hereditaments, and lent the sum of 14,000*l.* to them in that character, and not as executors of the testator, and required them to pay the succession duty payable by them as devisees for their own benefit of the mortgaged hereditaments, which they paid accordingly; and also required the wife of the defendant R. Plummer to execute a release of her claim to dower out of the mortgaged hereditaments.

That, although the testator had entered into negotiations for an advance to him from Dr. Russell's trustees on the security of a mortgage of the hereditaments comprised in the indenture of the 5th of March, 1857, such advance was not made in his lifetime, and he was under no binding obligation to borrow the same.

That, under the circumstances aforesaid, the defendants, Dr. Russell's trustees, had full notice, at the date of the mortgage and before they advanced the 14,000*l.*, that it was not being borrowed in order to pay any debts of the testator, or otherwise for purposes connected with his estate; or, if they had not actual knowledge, that the circumstances before stated were sufficient to put them on inquiry for what purposes the sum was borrowed.

The plaintiff prayed that it might be decreed that the mortgage of the 5th of March, 1857, ought to stand as a mortgage of the beneficial interest only of the defendants R. Plummer and M. Plummer; and that it was subject to the claims of the testator's creditors as part of his assets.

To this bill the defendants Dr. Russell's trustees demurred for want of equity. Stuart, V.-C., overruled the demurrer with costs, and from that decision the present appeal was brought.

Bacon, Q.C., Giffard, Q.C., and Walford, for the defendants Dr. Russell's trustees, relied on the law as

stated by Lord St. Leonards, Vendors and Purchasers (14th ed.), 661: "If the sale or mortgage, from the circumstances of the transaction, afford evidence that the purchase-money was not to be applied for the debts or legacies, the purchaser or mortgagee would be liable to the charge: but that would not be inferred on light grounds."

They referred to

Colyer v. Finch, 5 H. of L. Ca. 905;

Eland v. Eland, 4 Myl. & Cr. 420.

In

Stroughill v. Ansley, 1 De G. M. & G. 635, great stress was laid on the delay of sixteen years which had elapsed between the testator's death and the mortgage; and in

Watkins v. Cheek, 2 S. & S. 199, there was distinct evidence of knowledge by the mortgagee of a breach of trust.

They also referred to

Taylor v. Hawkins, 8 Ves. 209.

They submitted that the proper mode of defence in a case like the present was by demurrer; and if the defendants omitted to demur, they did so at the risk of costs,

Nesbitt v. Berridge, 1 N. R. 345;

Godfrey v. Tucker, 3 N. R. 20.

Malins, Q.C., and *Dickinson*, for the bill, contended that the special circumstances alleged by the bill were sufficient to have put the mortgagees on inquiry,

Haynes v. Forshaw, 11 Har. 98.

In the present case the shortness of the time which elapsed between the testator's death and the mortgage was as much a ground of suspicion as the length of time in

Stroughill v. Ansley (*loc. cit.*), for the mortgagees knew that the testator was negotiating a loan shortly before his death, and that should have put them on inquiry.

Bacon, Q.C., in reply.

Knight Bruce, L.J., who had observed during the argument that he strongly disapproved of the introduction of unfounded allegations into a bill in order to avoid a demurrer, and had referred to Lord Hardwicke's opinion in *Brownson v. Edwards* (2 Ves. 243)—that even in some cases of construction a demurrer might be properly overruled without prejudice to the defendant's right of taking the same defence at the hearing, said, that he thought the statements in the bill exhibited a case which required an answer, and rendered it unfit for the Court to come to a conclusion on the merits of the question in its present state. He thought, therefore, that the demurrer should remain overruled, with a reservation to the defendants of the benefit of their defence at the hearing; the appeal deposit to be returned, and the costs of the demurrer before their Lordships and in the Court below to be dealt with by the Vice-Chancellor.

TURNER, L.J., said that as the Lord Justice Knight Bruce agreed with the Vice-Chancellor, it was unnecessary for him to express an opinion; his impression, however, was, that the demurrer should have been allowed, for he did not think the allegations in the bill sufficient to show that the mortgagees knew that the mortgage money was not to be applied to the payment of the testator's debts. There was nothing more alleged against them than that they had dealt with the mortgagors as beneficial owners. He thought it of great importance not to throw doubts lightly on the power of persons in the position of these mortgagors to mortgage or sell their testator's estate. There must be many cases where debts, not approaching the value of the estate sold, remained unpaid, and in such cases he did not see how the devisees could deal with the estate, except as beneficial owners, for they would be beneficial owners of all that was not required for the payment of debts. Estates so circumstanced could not be dealt with at all.

Note.—See

Roberts v. Berry, 3 De G. M. & G. 284.

Master of the Rolls. } *HOLE v. GIMBLETT.*
4 Nov. 1864.

Uncertificated Bankrupt—Right to Sue—
Parties.

An uncertificated bankrupt, in a suit to recover remuneration for personal services rendered since the bankruptcy, alleged in his bill that his assignees claimed no interest in the sum due. It appeared by the bill that he still owed his creditors sixpence in the pound:—

Held, on demurrer, that he could maintain the suit, and that the assignees were not necessary parties.

This was a suit to recover from the defendants, as executors of Mr. Hole, a balance due to the plaintiff, as master of a vessel. The defendants in their answer had objected that the plaintiff was an uncertificated bankrupt. The bill had thereupon been amended, and it now alleged that the plaintiff had become bankrupt in 1847, and had never obtained a certificate, but had paid his creditors 19s. 6d. in the pound, and that his assignees claimed no interest in the subject matter of the suit, which was money earned since the bankruptcy by the plaintiff's personal exertions.

The defendants demurred to the amended bill.

Southgate, Q.C., and *W. W. Karslake*, for the demurrer, argued that the plaintiff could not maintain the suit without having obtained his certificate, and that even if he could, his assignees were necessary parties.

Selwyn, Q.C., and *Rowcliffe*, for the bill, contended that an uncertificated bankrupt could acquire property as against all the world except his assignees; and that

especially he could so acquire what is earned by his personal exertions, and could maintain actions to recover such property and earnings from third persons, unless they could show that the assignees had interfered,

Silk v. Osborne, 1 Esp. 140 ;
Webb v. Fox, 7 T. R. 391 ;
Drayton v. Dale, 2 B. & C. 293 ;
Fyson v. Chambers, 9 M. & W. 460 ;
Herbert v. Sayer, 5 Q.B. 965 ;
 1 Selwyn's Nisi Prius, 292.

Here there was not only no allegation that the assignees had interfered, but it was alleged that they disclaimed.

Southgate, Q.C., in reply, contended that the cases cited showed only, that at law the bankrupt could contract as the agent of the assignees, and could sue on such contract in his own name, because, until the contrary was shown, he might be suing for the benefit of his assignees. But that did not apply in Equity, where the assignees must be parties to the cause, that it might be known whether they allowed the bankrupt to receive the money sued for or not. The plaintiff still owed his creditors sixpence in the pound, so that the assignees would be committing a breach of duty if they disclaimed.

THE MASTER OF THE ROLLS said, that the plaintiff was entitled to sue for the remuneration of his personal services, if his assignees did not claim the amount. It was true that he still owed his creditors sixpence in the pound; but, notwithstanding that, there might be circumstances which made it justifiable for his assignees to disclaim. The assignees were not necessary parties to the suit, if the plaintiff could prove that they claimed no interest in it. It was not necessary for the plaintiff in a foreclosure suit to make a person interested in the property a party, whom he alleged and could prove to have previously disclaimed all interest in the matter. So, in the present case, if proof could be given of the disclaimer of interest by the assignees, it was not necessary to make them parties in order that they might disclaim. The plaintiff must, of course, prove the disclaimer, like any other fact in the cause. The demurrer must be overruled.

Master of the Rolls. } *JOHNSON v. HELLELEY.*
 7, 8 Nov. 1864.

*Practice—Partnership—Sale of Goodwill—
 Book Debts—Form of Advertisement.*

In a suit for winding up a partnership, the partnership property was ordered to be sold as a going concern, with exclusive right to the purchasers to hold themselves out as the successors:—

Held, that the surviving partner was entitled to have it stated in the advertisement and particulars of sale,

that his right to set up the same business in the same town was reserved.

Held also, that the book debts must not be sold apart from the goodwill.

This suit was instituted by William Johnson against the executors of his deceased brother John Johnson, to wind up the partnership which had been carried on between them, under the name of Samuel Johnson & Sons. The usual decree had been made, including an order for the sale of the partnership property in the way which should be found to be most beneficial to all parties. The Chief Clerk certified that it would be most beneficial to all parties to sell the property of the partnership "as a going concern, with the exclusive right in the purchaser or purchasers to hold out himself or themselves as the successor or successors of Samuel Johnson & Sons" in the business, and that the business should be sold with the premises in one lot.

The conduct of the sale, the plaintiff having obtained leave to bid, was given to the defendant Nicholson, who proposed a form of advertisement of the sale which corresponded with the words of the Chief Clerk's certificate, with the addition, that the purchaser was to take the stock at a valuation, and "also to take the book debts of the said firm at a sum to be affixed." The book debts were estimated at 50,000*l.*, and the stock at 10,000*l.*

The plaintiff proposed (1), that a clause should be added to the advertisement and particulars of sale, stating that the surviving partner was at liberty to carry on the same business in the same town; (2), that it should not be compulsory on the purchaser of the business to take the book debts, but that it should be left to his option. The matter was adjourned into Court.

Hobhouse, Q.C., and *Waller* for the defendant Nicholson, contended:

On the first point, that it was the plaintiff's interest to injure the sale by inserting a kind of threat in the advertisement that he was going to set up business. The plaintiff could not hold himself out as "successor" of the old firm, although he might set up the same business, and state that he was the surviving partner of the old firm. If he made representations that were not true or *bona fide*, or that were calculated to mislead the public, he would be restrained at the suit of the purchaser. According to the authorities, the right of the purchaser would be "exclusive,"

Hall v. Barrows, 1 N. R. 543; on appeal, 3 N. R. 259;

Bury v. Bedford, 1 N. R. 5;

Crutwell v. Lye, 17 Ves. 335;

Churton v. Douglas, John. 174;

Cook v. Collingridge, Jac. 607; 27 Beav. 456;

Smith v. Everett, 27 Beav. 446;

Mellersh v. Keen, 28 Beav. 453.

On the second point, that the evidence showed that it was usual to sell the book debts with the goodwill, and that they formed one of the means of introducing a purchaser to the customers and ensuring to him the goodwill. But if the plaintiff bought the goodwill he would not want this introduction, and would not care to buy the book debts, which would therefore realise very little.

Faber, for the other defendants, took no part in the argument.

C. Hall (Baggallay, Q.C., with him), for the plaintiff, contended,

On the first point, that it would be a concealment of the truth if the clause proposed by the plaintiff were omitted from the advertisement, and a purchaser could not be compelled to complete. Usually the right of the surviving partner to set up the same business was stated in the decree, and then it was unnecessary to state it in the advertisement of sale; but no mention was made of it in the decree in the present suit. It would not be fair dealing to leave the purchaser to rely on legal subtleties about *bona fide* representations.

On the second point, that the amount of the book debts was so large, it might be very prejudicial to the sale to insist on a purchaser of the goodwill buying them as well as the stock. Such a large capital would be required for this, that competition would be diminished, and a less price realised.

Hobhouse, Q.C., in reply, as to the first point, argued that the doctrine of *caveat emptor* applied in such a sale as the present; that the purchaser must know the law as to surviving partners, and should inquire whether there was a surviving partner. All purchasers were subject to legal subtleties. It would introduce a new practice to insert the proposed clause.

THE MASTER OF THE ROLLS said, that, no doubt the Court always desired to sell property as advantageously as possible, but the principle was clear that the whole truth must be disclosed in the particulars of sale. Now it was impossible to say that a purchaser would have the exclusive right of holding himself out as successor of the firm of Samuel Johnson & Sons, when the plaintiff was, as he was admitted to be, entitled to set up a similar business in his own name of Johnson, in the same street, and to say that he was the surviving partner of Samuel Johnson & Sons. The value of the goodwill might be very great, if there was no other person than the purchaser who could rightfully represent himself to the customers of Samuel Johnson & Sons as connected with the old firm, but it might be very small, if the surviving partner could likewise do so. If a purchaser applied to the Court on the ground that he had bought the goodwill without knowing that the surviving partner could set up a similar business, the Court would probably set aside the sale. Although it was unusual to put in any such clause as

proposed, yet it was necessary to show clearly in the particulars and conditions of sale, and in the advertisement, that the plaintiff William Johnson was at liberty to carry on a similar business in the same town.

As to the second point, the book debts must be sold with the business. It was the mode by which a stranger to the business was able to acquire the goodwill and retain the old customers of the firm. It was obvious that if it was left to the option of the purchaser to take the book debts or not, the plaintiff who did not require them as an introduction to the customers of the firm would be able to give a larger price for the goodwill than another person who would have to buy the book debts as well; the plaintiff might refuse the option of taking the book debts, and they would be almost worthless to any one else. The purchaser must be obliged to take the book debts at a price to be affixed. The costs of all parties to be costs in the cause.

Kindersley, V.-C. } BAGOT v. LEGGE.
3 Nov. 1864.

Practice—Costs—Administration Suit.

In a general administration suit involving questions relating to realty where there was no personalty and no debts, the costs of the suit were ordered to be paid out of the devised and descended estates pro rata.

This was a general administration suit (reported on the former hearing, 4 N. R. 492), which now came on for further consideration and on the question of costs. It also involved the decision of questions between the devisees *inter se* and the devisees and heir-at-law *inter se*.

The Chief Clerk by his certificate found that there was no personalty and no debts.

The present report is confined to the question of costs arising under the above circumstances.

Glasse, Q.C., James, Q.C., and Fitzroy Kelly, for the parties interested in the devised estates, asked that the costs of the suit should be borne by the descended estates.

Daniel, Q.C., and Rasch, for the parties interested in the descended estates, denied that the costs ought to be thrown upon them. At all events, the heir-at-law ought only to be charged with his proportion of the costs of the suit.

Maddison v. Pye, 32 Beav. 658.

Baily, Q.C., and Atkin, for other parties.

Shapler, Q.C., and Lewin, for the trustees.

KINDERSLEY, V.-C., said, that in a suit for the administration of personal and real estate, the ordinary rule was, that where there was both personal estate to

administer and debts to pay, the personal estate, so far as related to the costs of the suit, *quæ* suit for the administration of the personalty, paid first the costs and then the debts. If there was not sufficient to pay the debts, then, of course, the real estate was resorted to. But if, besides the question of administration, there were also questions relating to the devisees' interests under the devise in the will, it did not follow that the personal estate would bear the costs of the determination of those questions,—so far as those questions occasioned costs to be incurred. In the present instance there was an administration suit, but it was a suit which, besides the question of general administration, raised questions which were quite irrespective of, and had nothing to do with, administration, but concerned only the rights of the different devisees *inter se*, or the rights of the different devisees and heir-at-law *inter se*; which questions, of course, had nothing to do with administration. Moreover, in the present case there was no personal estate to administer, and there were no debts to pay, and the persons who were the proper persons to bring forward the questions which had been argued were persons who had no interest in the administration of the personal estate, except so far as it was desirable for a devisee of the real estate to obtain administration, in order to clear the estate devised to him of all liability to debts by the application of the personal estate to that purpose; and although a portion of the costs had been incurred in respect of inquiries as to the personal estate and debts, yet that was not the whole of the costs of the suit.

There being here no personal estate to pay the costs, and no debts to pay, the point was, what was to be done with regard to the costs, including, of course, the costs of those inquiries, which had been properly incurred, in connection with the administration. If there were personal estate, then the costs of the administration would come out of the personal estate, as he had said. But there was here no personal estate, and therefore the whole question seemed to him to resolve itself into this: The present was a suit which involved administration; that is, inquiries as to the personal estate for the purpose of administration, but it had turned out, under the decree to administer, that there was nothing to administer, and no debts to pay under the administration. This suit had therefore resolved itself into one in which the questions evolved were entirely questions between the devisees, and the devisees and heir-at-law; and whatever might be the rule as to administration, estates which were the subject of controversy must bear the costs *pro rata*. It did not appear to him that the principle of the costs being first payable out of the personal estate and then out of the descended estate applied to such a case as the present, where, in point of fact, the questions were entirely questions relating to the rights of the devisees *inter se*, and the rights of the devisees

and heir-at-law *inter se*. Therefore the costs must be borne *pro rata* out of the devised and descended portions of the estate.

Stuart, V.-C. }
3, 4, 5 Nov. 1864. } BARROW v. GRIFFITH.

Charge of Debts — Mortgage by Executor — Priority.

An executor and beneficial devisee of realty, subject to a charge of debts, included private property of his own in a mortgage of the devised estate:—

Held, not to afford such intrinsic evidence of an intention on the part of the executor to misapply the money as to deprive the mortgagee of his security.

William Glynne Griffith, who died in 1842, devised his real estates in Carnarvon and Anglesey, subject to a charge of debts and legacies, to his son, the defendant D. W. Griffith, and made him and another his executors. The estates were incumbered, and the personal estate proved insufficient to pay the debts.

D. W. Griffith raised various sums by mortgages, which included lands of his own and of the testator. The mortgages recited the will and probate, but not that the money was wanted to pay the debts. It was not proved whether the money was in fact so applied or not.

The plaintiffs, specialty creditors, filed a bill for administration against D. W. Griffith, the then heir-at-law and surviving executor. Inquiries were directed, and the question of the priority of the mortgagees over the creditors claiming under the charge was adjourned into Court.

Bacon, Q.C., and F. O. Haynes, for the plaintiff.

The mortgagees who took the security of D. W. Griffith's own estate had notice that the executor was borrowing for his own purposes, and could not stand in priority over the general creditors on the devised estates,

Haynes v. Forshaw, 11 Hare, 93;

Carter v. Sanders, 2 Drew. 248.

Greene, Q.C., and Jones Baleman, for the mortgagees, contra.

The trustee or executor is the proper person to mortgage for the purpose of paying the debts; the mortgagee is not bound to inquire for what purpose the money is wanted; and nothing but intrinsic evidence, appearing on the face of the transaction, that the executor is not acting in discharge of his duty, will deprive the mortgagee of his protection. The fact of an executor having included in the mortgage property belonging to himself affords no such evidence, where the executor is also owner, subject to the charge,

Colyer v. Finch, 5 H. of L. Ca. 905, 923 ;
Elliot v. Merryman, 2 Atk. 4 ;
Page v. Adam, 4 Beav. 269 ;
Shaw v. Borrer, 1 Keen, 559 ;
Stroughill v. Ansley, 1 De G. M. & G. 635, 649 ;
Eland v. Eland, 4 Myl. & Cr. 420 ;
Watkins v. Chesk, 2 S. & S. 189 ;
Miles v. Durnford, 2 De G. M. & G. 641 ; (where
 even an inquiry into the circumstances of the
 loan was refused) ;
M'Leod v. Drummond, 17 Ves. 152 ;
Sng. V. & P. 661 (14th ed.).

Cola, Q.C., and *Macnaghten*, for other parties in the same interest.

It is usual for executors and devisees in trust to pay debts, who are also beneficially interested in the estate, to covenant, on a mortgage, for payment of the mortgage debt,

2 Davidson, Conv. 841, note (2nd ed.).

A personal covenant is quite as strong a circumstance as a collateral security.

Osborne, Q.C., and *Roucliffe*, for mortgagees entitled to priority.

Malins, Q.C., *Kenyon, Q.C.*, *Batten*, *Dickinson*, *Kingdon*, *Johnson*, *Langworthy*, and *Foz*, for other parties.

Bacon, Q.C., in reply.

We do not say that the giving collateral security is conclusive, but that it is strong evidence to show improper dealing.

STUART, V.-C., said that it had appeared to him at first that the inclusion of private property in the mortgage would raise a presumption that the transaction was not attributable to the ordinary duty of the executor. He thought, however, that that was not a correct view of the law. Since the decision in *Ball v. Harris* (4 Myl. & Cr. 264), the rule in favour of purchasers and mortgagees who claim from an executor owning the property, subject to a charge of debts, had been very clear,—viz., that the transaction must afford intrinsic evidence that the money was not to be applied in payment of the debts. It was true that Sir W. Grant and Lord Eldon were not quite in accord ; but Lord Eldon had said—what all subsequent cases seemed to be consistent with—that the mere circumstance that the executor added property of his own, would not alone suffice to invalidate the transaction. The mortgagees would therefore take priority over the creditors claiming under the charge.

Note.—See

Collingwood v. Ruppell, p. 1 *supra*.

Wood, V.-C. } *BUCKLE v. BRISTOW.*
 5, 8 Nov. 1864.

*Will, Construction—Void for Uncertainty—
 Gift to Executors—Resulting Trust.*

A testator gave real and personal property to executors and trustees upon trust, to convert and hold upon such trusts as he might appoint, and "in default of appointment, then for the same to be expended and appropriated within three years after his decease in such way and manner and for such purposes as they or the majority of them in their judgment or discretion should agree upon." By codicil the testator gave certain pecuniary legacies to the executors "irrespective of any interest they might ultimately take in the residue of his estate":—

Held, that the executors were trustees for the heiress-at-law and next of kin.

A testator by his will dated the 12th of August, 1863, after directing his just debts and funeral and testamentary expenses to be paid, gave, devised, and bequeathed all and every his property, estate, and effects, to his trustees and executors thereafter mentioned upon trust for conversion, and directed that their receipts should be good discharges for the same. He then gave several legacies to charities, some of which were to be expended in annual sums by his trustees until exhausted. The will then proceeded: "I give the residue of my property (after payment of the foregoing amounts) upon trust for my executors, to hold the same for such uses and purposes as I may by codicil or deed direct or appoint, and in default thereof, then for the same to be expended and appropriated within three years after my decease, in such way and manner and for such purposes as they or the majority of them may in their judgment and discretion agree upon." The testator appointed five persons executors and trustees of his will.

By a codicil of even date, after giving to the same executors legacies of unequal amount, as tokens of his esteem, and directing the legacies to be retained by his executors for their absolute benefit, proceeded thus: "And I also give such five legacies irrespective of any interest they, my said executors, may ultimately take in the residue of my estate." He then gave other pecuniary legacies of small amount to various persons, and a freehold estate to one of his executors for his absolute use.

The testator died on the 28th of April, 1864, without having made any appointment of the residue, and four of his executors, claiming to be beneficially entitled to it, by a deed poll of the 6th of July, 1864, appointed the residue in equal shares among the five executors. The bill was filed by the plaintiff, the heiress-at-law and sole next of kin of the testator, and prayed, among other things,—that the trusts by the will declared of the residuary estate of the testator might

be declared void for uncertainty; for administration; and a declaration that the deed poll of the 6th of July, 1864, was inoperative and void.

The executors demurred, for want of Equity.

Willcock, Q.C., Roll, Q.C., Roupell and Robinson, in support of the demurrers, argued, that the word "trust," in the residuary bequest, only extended to the first part of the sentence. That no stress could be laid on the word "expended," and that "appropriate" was a proper word for a person giving to himself. The gifts in the codicil to the executors were of unequal amounts, and the words "irrespective of any interest they, my said executors, may ultimately take in the residue of my estate," had no meaning, unless the testator intended that they might appoint to themselves so much of the residue as he might not subsequently dispose of, for they could not otherwise take any benefit in his estate. This was the case of a general power of appointment in the executors, and not a trust. They cited,

Dawson v. Clark, 15 Ves. 409; on appeal, 18 Ves. 247;

King v. Denison, 1 V. & B. 272;

Gibbs v. Rumsey, 2 V. & B. 294;

Barrs v. Fewkes, 3 N. R. 704;

Harrison v. Harrison, 4 N. R. 224;

Williams v. Roberts, 4 Jur. (N. S.) 18.

Giffard, Q.C., and Speed, in support of the bill, argued that this was a trust, and a trust too indefinite to be carried into effect, and one which must therefore result in favour of the heiress-at-law and next of kin respectively. They cited,

Morice v. Bishop of Durham, 9 Ves. 399;

Fowler v. Garlike, 1 Russ. & My. 232;

Vezey v. Jamson, 1 S. & S. 69;

Stubbs v. Sargon, 2 Keen, 255;

and the note in 1 Jarman on Wills, p. 535, to *Dawson v. Clark*.

Willcock, Q.C., in reply, cited,

Hughes v. Evans, 13 Sim. 496.

In *Morice v. Bishop of Durham* (*loc. cit.*), and the cases cited of resulting trust, it was evident, at all events, that the executors were not intended to take.

WOOD, V.-C., after reading the part of the will upon which the difficulty arose, observed, that the words "upon trust" in the residuary bequest extended grammatically through the whole clause; it was upon trust to be expended and appropriated, &c. First, taking the will by itself, he must consider its bearing with respect to *Gibbs v. Rumsey* (*loc. cit.*), on the one side, and *Fowler v. Garlike* (*loc. cit.*), on the other.

He was at first inclined to believe, having regard to the decision in *Gibbs v. Rumsey*, that the plaintiff must wait till the expiration of the three years, but on considering *Morice v. Bishop of Durham*, and similar cases, and the judgment of Sir J. Leach in *Vezey v. Jamson*,

which was in direct confliction with Sir W. Grant's decision, he came to the conclusion that the rule laid down by Sir J. Leach was correct, and in accordance with the decision in *Morice v. Bishop of Durham*. Lord Cottenham, in *Ellis v. Selby* (1 Myl. & Cr. 286), said, "If the two cases of *Gibbs v. Rumsey* and *Fowler v. Garlike*, can stand together, the latter would be a much stronger authority in favour of this being construed as a trust than the former would be in favour of its being construed as an absolute gift. Questions of this kind, however, must be decided on the construction of the language of the instrument in each particular case." In the present case the bequest was "upon trust"; but if these words had been omitted, and the testator had merely given his residuary estate to the executors, to be expended and appropriated as they in their discretion might agree, he could not construe the bequest as a gift to the executors personally, or one which gave them power to dispose of it to any one, including themselves. He could not think that when the testator gave a majority of his executors the power to decide, he meant that three of them might share the property among them to the exclusion of the other two.

This was a trust, not ownership, and the executors being trustees could not appoint to themselves, and the trust was too vague and uncertain for the Court to execute. As to the codicil, that favoured the construction he had put upon the will. The defendants contended that the words, "irrespective of any interest my executors may ultimately take in the residue of my estate," had reference to an appointment of the residue which they might make among themselves, as he had given them no interest in his estate independently of the legacies in the codicil, —if so, then the clause must be taken to mean "irrespective of any interest the majority of my executors may agree upon." The testator contemplated a future act; but which was the more likely, a future act to be done by himself or by the executors? It was evident that the testator, though quite unnecessarily, had reserved to himself this power, and having by one codicil, made on the same day as his will, given legacies of unequal amounts to his executors, thought he might perhaps on a future occasion make a further gift to some of them.

WOOD, V.-C. } HOWARD v. WOODWARD.
8 Nov. 1864.

Solicitor—Clerk—Injunction—Liquidated
Damages.

A solicitor and his clerk executed a bond, conditioned that if the clerk should carry on the business of a solicitor within a prescribed distance, then, provided he paid 1000*l.* as liquidated damages, the bond should be void. The clerk commenced business as a solicitor within the prohibited limit:—

Held, that the solicitor was entitled to an injunction.

The plaintiff, a solicitor, engaged the defendant as his clerk, under an arrangement that the defendant should not set up in business within fifty miles of Weymouth or Melcombe Regis. Two years subsequently, a bond was executed by the defendant, in consideration of a gradually increasing salary. The condition of the bond was as follows: "That if the said W. shall carry on the business of a solicitor within fifty miles of Weymouth or Melcombe Regis, then if the said W. shall pay to the said H. the full sum of 1000*l.*, as and for liquidated damages, the said bond shall be void and of no effect, otherwise it shall be and remain in full force and virtue." The defendant subsequently took out a certificate to practise as a solicitor, and set up in business in Weymouth.

Giffard, Q.C., and *Bedwell*, for the plaintiff, cited,
French v. Macale, 2 Dr. & W. 269;
Coles v. Sims, 5 De G. M. & G. 1.

Rolt, Q.C., and *Dickinson*, for the defendant, contended that the law did not favour restraints upon trade. Though now not absolutely prohibited, they were regarded with suspicion.

Here there was no covenant not to practise, but an agreement that if defendant did practise, he should

pay a certain sum as liquidated damages—in fact, as purchase-money for his business,

Woodward v. Gyles, 2 Vern. 119.

These were liquidated damages, and not a penalty,
Galsworthy v. Strutt, 17 L. J. (N. S.) Ex. 226.

WOOD, V.-C., said that he could not *prima facie* imagine in the present instance that it was intended that the defendant, on the payment of a specified sum, might commence business as a solicitor in opposition to the plaintiff, and thus possibly carry off the business of his late employer. The agreement and the bond must be taken together, the increased salary forming a good consideration for the bond.

It was true that the granting of an injunction was a matter of indulgence, but one to which in the present instance the plaintiff was entitled, considering the confidential relation which must always exist between a solicitor and his clerk, and the opportunities the latter had of ingratiating himself with his employer's clients, and consequently the great damage that might accrue to the plaintiff by his clerk's setting up business in opposition to him.

The defendant would be restrained from practising as a solicitor within fifty miles of Weymouth or Melcombe Regis; but the plaintiff must undertake not to sue upon the bond.

COMMON LAW.

Q. B. } ALLDAY v. THE GREAT WESTERN
2 Nov. 1864. } RAILWAY COMPANY.

Coram—COCKBURN, C.J., MELLOR, CROMPTON,
and SHER, JJ.

Railway Company—Liability as Carriers—
Limitation of Liability by Notice—Just and
Reasonable Condition—Injury to Cattle by
"Overcarriage"—17 & 18 Vict. c. 31, s. 7.

The fact of cattle being out of condition in consequence of overcarriage, is an injury done to cattle within the meaning of the 17 & 18 Vict. c. 31, s. 7.

By the same section a railway company have power to enter into special conditions with respect to forwarding, receiving, or delivering goods, horses, cattle, &c., on their own line, provided such conditions be just and reasonable. A condition that the company will not be, inter alia, "answerable for any consequences arising from overcarriage or delivering, detention or delay, in or in relation to the conveying or delivering, however caused," is not a just and reasonable condition within the meaning of the said section, there being only one

rate of charge, and no option being given to the sender of sending at any other rate of charge.

Peek v. The North-Staffordshire Railway Company, followed.

The action was against a railway company for delay in delivering cattle. The plaintiff in 1861 bought certain cattle at Oxford market, and delivered them to the station-master to send to Birmingham market, and signed at the time of delivery a ticket in the following form:—

"Cattle, sheep, and pigs (reduced rates).

"To the Great Western Railway, Oxford Station.

"Nov. 13, 1861.

"Received from Allday, of —, the under-mentioned animals, on the conditions stated below, and at the special reduced charge below the rates authorised by law.

"To be sent to Boreasley Station.

"Special conditions.

"The loading and unloading is to be performed by the sender, and any assistance voluntarily given by the company's servants to be at the risk of the owner.

The company are not to be subject to any risk in receiving, loading, forwarding in transit, and unloading, nor to be answerable for any damage actual or consequential arising from suffocation, from being trampled on, bruised, or otherwise injured from fire, or any other cause whatsoever, nor for any consequences arising from overcarriage or delivering, detention, or delay, in or in relation to the conveying or delivering of the said animals, however caused.

"If on the arrival of cattle and other animals at their destination no one shall be ready to receive the same on behalf of the consignee, the company will, at the discretion of the superintendent of any station, send such animals into yards or other convenient places at the expense and risk of the sender or consignee, and if not claimed within seven days the same will be sold to defray expenses and pay charges. In order to guard against disappointment, the public are recommended to give two clear days' notice of their intention to send cattle from any station, so that the company may if possible provide trucks. And to afford time for receiving and loading such cattle and stock, they should be at the station not less than two hours before the departure of the train by which they are intended to be conveyed.

"N.B. The conditions cannot be altered or dispensed with by any person whomsoever, and are applicable for the whole distance carried over the Great Western, the Bristol and Exeter, the South Devon and the South Wales Railways, and any other railway or conveyance in connection therewith, or either of them."

The rates said to be "reduced" were the rates usually charged. The company have two stations for the delivery of cattle for the Birmingham market, one for the cattle from Oxford, south of Birmingham, Bordesley (which is the one mentioned in the ticket); the other north of Birmingham, to which cattle coming from Oxford would not be sent, the station south of Birmingham being the proper station for that purpose: to that station, however, the cattle were carried. The plaintiff's servant came to inquire at the south (Bordesley) station, and found the next day that they had been carried on to the northern station. On the following day he received them from the company there; he thereby lost the market. He claimed compensation, which was refused, and after the recent decision of *Peek v. The North-Staffordshire Railway Company* (3 N. R. 1; 32 L. J. Q. B. 241), the plaintiff brought his action. It was tried at the last Warwick Assizes before Mr. Justice Keating. The company relied on the special conditions, and contended this was a case of "overcarriage" within the conditions. The Judge ruled against them, but reserved leave to the defendants to move to enter it for them on the above grounds. There was a verdict for the plaintiff for 15*l*.

Field, Q.C. (*Manby Smith* with him), moved to

set aside the verdict, on the ground that the injury to the cattle was not an injury done to them within the 17 & 18 Vict. c. 31, s. 7, and that the condition was reasonable within the meaning of the said section.

COCKBURN, C.J.—It is admitted on both sides that there was injury to the cattle by loss of condition by overcarriage. We think this is clearly an injury to cattle within the meaning of the statute. As to the condition I am of opinion that it was an unreasonable one. The company claimed immunity in the event of delay caused by their own negligence, or that of their servants; and though the rates charged were called reduced rates, they were the usual rates: so that there was no consideration for such immunity. There is a special contract, and it might be made in such a form as this: we will charge you at half price, if you will release us from liability and take your chance of the safe arrival of your goods. And supposing the rate of charge were reduced, it might be a reasonable condition; but there was no such thing, and the charges called "reduced" do not appear to have been made in relation to any higher rate, and therefore I think the direction was right.

CROMPTON, J.—I concur with the Lord Chief Justice. The condition was clearly an unreasonable one, for there was no option given to the sender of the cattle as to the conditions: on the contrary, the conditions were compulsory. As to the loss, it clearly is injury done to the cattle, and proximate injury, arising directly and proximately from the fault of the company.

MELLOR and SHEE, JJ., concurred.

Rule refused.

Q. B. } HEALEY v. THE THAMES VALLEY
2 Nov. 1864. } RAILWAY COMPANY.

Compensation—Railway—"Lands taken or injuriously affected"—Notice to Railway Company of "nature of interest"—8 Vict. c. 18, s. 68 (Lands Clauses Consolidation Act, 1845).

A claimant for compensation under section 68 of the Lands Clauses Consolidation Act, in his notice to the company gave the following description of his interest in the premises:—"The said lands and hereditaments are held by me on lease, and are used by me partly as private grounds, and partly for public purposes."

Held, that this notice did not sufficiently indicate the nature of the claimant's interest.

This was an action under section 68 of the Lands Clauses Consolidation Act, 1845, by a claimant for compensation in respect of lands taken by the company for the purposes of their works. That section

is as follows :—"If any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury as he shall think fit; and if such party shall desire to have the same settled by arbitration, &c. . . . or if by a jury, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein."

The company gave the notice to treat, which he disregarded, and they then took possession of the premises which they required, whereupon the claimant gave notice of his desire to have the compensation settled by a jury. The part of the notice on which the question turned is as follows :—"The said lands and hereditaments are held by me on lease, and are used by me partly as private grounds, and partly for farming purposes."

The company taking no proceedings for a jury, the claimant brought his action under the penal clauses of the Act.

It was objected at the trial that the notice was insufficient, as it did not state the duration of the term under which he held the premises on lease.

The verdict was for the full amount claimed, leave being given to the defendants; and

Bovill, Q.C., obtained a rule on behalf of the company to set aside the verdict, on the ground that the notice was intended to enable the company to form a judgment as to whether the amount of compensation claimed was reasonable, which could not be done unless the duration of the term under which the claimant held was mentioned.

Coleridge, Q.C. (*Patchett* with him), now showed cause.

I submit that this notice was sufficient. Section 68 is connected with section 122, and if the company wish to have further particulars, they can inspect the lease itself. The meaning of an interest is the legal quality of his estate, and "on lease" is an expression known to the law,

Cameron v. The Charing Cross Railway Company,
4 N. R. 150; 12 W. R. 803.

Bovill, Q.C., in support of the rule.

Cockburn, C.J.—I have had some difficulty in arriving at a conclusion. The language of section 68 seems to imply that this notice should contain a statement of the quality of the interest without a

statement of its duration or amount. The nature of the interest seems to refer to its quality as freehold or leasehold, rather than as embracing a statement of the number of years. But though *prima facie*, that is the signification of the words used, yet the term is a general one, and may be interpreted to comprehend a statement of quality as well as quantity: and if that interpretation was intended, as evinced by the whole scope of the Act, we must give it that construction. Where a power is given to take lands without the consent of the owners—firstly, a notice of the intention of the company to take lands, and secondly, of a readiness to treat, are to be given. And in order to enable a company to do so. they are to demand particulars (according to section 18) of the claimant's interest, to enable them to treat on fair grounds with the proprietor of lands, so that if he, the claimant, intends to negotiate, he may avoid litigation.

The word "particulars" must be such particulars as will enable the company to meet the just claims of a party by ascertaining the true amount of the value of the land, so as to offer compensation. If the party decline or fail they are not to be defeated, for by the power given by the Legislature they can take possession, and the owner of the land must make his claim. The question then is, is he bound to do less in his statement of particulars under section 68 than he is under section 18? There is no reason why he should do less in the one case than in the other. Section 68 is capable of a more limited construction, but we must give it a reasonable construction, and unless the words there used have a more extensive signification, the company cannot be in a position to satisfy the owner of the lands.

I think the true construction of the language used in section 68 is synonymous with that used in section 18. Now, in this case, the nature of the interest is described as leasehold: this gives no information by which the company can be guided, and I think the claimant has not done sufficient to satisfy the statute. The case of *Cameron v. The Charing Cross Railway Company*, in the Common Pleas, I do not quarrel with, and I fully concur with the language there used, but it does not apply to the present case, and I think the true construction of the words used in section 68 is, that the same particulars are required as in section 18, and that the notice in this case was insufficient, and therefore judgment must be for the company.

Crompton, J.—I am of the same opinion. The notice should be a valid one, and one on which the company could act. Looking at the whole Act, the word "particulars" were used in one place and "nature of interest" in another, but that was merely a variation in language, and they were intended to have the same meaning. The notice, it was said in the case in the Common Pleas, was not to supersede every inquiry, but to give a reasonably sufficient notice to go upon the inquiry so as to form a reason-

able judgment, with reference to the subject-matter. The notice must be one which will be of some assistance to the company, just as in the case of a bill of exchange. I think this was not such a notice, and was insufficient.

MELLOR, J.—I agree with the Lord Chief Justice. Looking at the "nature of the interest," I think the Legislature intended the notice to have the effect of enabling the company to form some notion of the nature of a claimant's interest, with reference to all the circumstances of the case. The case in the Common Pleas was decided with reference to the circumstances of that case, in which the injury was determined before the occupation had ceased. The information to be given, is that peculiar to the party which may enable the company to form some judgment as to the proper amount of compensation.

SHEE, J.—I am of the same opinion, and I think the words in section 68 are to be construed with the corresponding words in sections 18 and 19 and 20, and also 38 and 51. This notice did not enable the company to form any estimate of the nature of the interest of a claimant, and I think it was insufficient.

Rule absolute.

C. P. }
5 Nov. 1864. } ELWOOD v. CHRISTY.

15 & 16 Vict. c. 83, s. 35—*Assignment of Patent by Executors—Subsequent Registration of Title.*

The executors of a patentee assigned the patent to the plaintiff, and subsequently registered, first the probate, and then the assignment, under the Patent Law Amendment Act. The plaintiff having sued for infringement of the patent:—

Held, that the patent passed to the plaintiff by the deed of assignment, though the probate was not then registered.

Action for infringement of a patent, tried before Erle, C.J., at the Sittings for Middlesex, after last Hilary Term. Verdict for the plaintiff.

Probate of the will of the original patentee was granted on the 3rd of December, 1862; and on the 5th of February, 1863, the executors of the patentee assigned the patent by deed to the plaintiff. The probate of the will was registered on the 10th, and the assignment on the 14th, of the following April.

By 15 & 16 Vict. c. 83 (The Patent Law Amendment Act), s. 35, it is enacted, that a register of proprietors shall be kept, "wherein shall be entered . . . the assignment of any letters patent, or of any share or interest therein . . . with the name or names of any person having any share or

interest in such letters patent or licence, the date of his or their acquiring such letters patent, &c., and any other matter or thing relating to or affecting the proprietorship in such letters patent or licence . . . Provided always, that until such entry shall have been made, the grantee or grantees of the letters patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters patent," &c.

Bovill, Q.C., now moved (*inter alia*) for a new trial, on the part of the defendant, on the ground that the Lord Chief Justice misdirected the jury in telling them that the deed of assignment passed the patent to the plaintiff, the probate of the patentee's will not having then been registered.

The object of the Legislature in passing this Act was, that no person, being the owner of a patent, should deal with it till he had registered: and here the executors had no power to assign till they had done so. If it were otherwise, no one would register till just before action brought, and would then register all the intermediate dealings with the patent. The probate is "a matter or thing relating to or affecting the proprietorship."

[ERLE, C.J.—So is death.]

Then it must be registered; and so must a will, or the appointment of assignees in bankruptcy, or letters of administration if there be no will.

[ERLE, C.J.—Why should not the registration complete an inchoate title?]

PER CURIAM.—There can be no rule on this point.

Rule (on this point) refused.

C. P. }
5 Nov. 1864. } WHITELEY v. KING.

Lost Will—Presumption that Testator Destroyed it—Evidence of his Declarations.

Where a will is last seen in the possession of a testator, and is not to be found at his death, it is a presumption of fact that he destroyed it himself: but his declarations as to his having settled his affairs and appointed executors, and as to the custody of the will, are admissible to rebut this presumption, though unaccompanied by any act referable to his intention regarding the will.

In this ejectment, which was tried before Blackburn, J., at Leeds, a verdict was taken for the defendants.

The plaintiff was the grandson and heir-at-law of John Whiteley, and the defendants claimed as devisees under a will of the said John Whiteley, dated the 16th of September, 1859, and a codicil dated the 17th of September, 1861. The testator, who had made several previous wills, made that of 1859, revoking all prior wills, to suit the altered state of his family. All these wills, including that of 1859, had been prepared by

the same attorney, a Mr. Sutcliffe, and he always had the custody of them. In September, 1861, the testator wished to alter his will, with reference to the provision he had made for the plaintiff, and other matters. He accordingly wrote to Sutcliffe, who brought to him his will of 1859, and a codicil for execution. The codicil having been duly executed, Sutcliffe was about to take it away with the will, according to his previous custom; but, according to his evidence, at the request either of the testator or of his daughter, he left them in the custody of the testator. The testator died in June, 1863; and up to the time of the trial the will and codicil could nowhere be found. Mr. Sutcliffe, however, had drafts of them.

Kemplay, now moved, pursuant to leave reserved, to enter the verdict for the plaintiff on the following ground:—

The will was last seen in the testator's possession, and therefore the presumption is that he himself destroyed it *animo revocandi*,

Brown v. Brown, 8 El. & Bl. 876;

Warrham v. Warrham, 4 N. R. 117; 33 L. J. Prob. 75;

Taylor on Evidence, 164, § 135, (4th ed.).

This presumption of fact must prevail unless it be rebutted by sufficient evidence. The defendant began at the trial, and the only evidence he gave consisted of declarations made by the testator to members of his family, and others, that he "had settled his affairs," that he had appointed certain persons executors, and that "his will was at Sutcliffe's." These declarations were made at different times in the year before, and up to within a short time of his death; but they were not accompanied by any act, and were therefore inadmissible to prove that the testator did not himself destroy the will. A declaration made whilst tearing the will would of course be admissible. The testator may have changed his mind after any of these declarations, the witnesses who speak to them may be interested parties, and the testator may have made false declarations to keep his relations quiet.

Patten v. Poulton, 27 L. J. Prob. 41.

ERLE, C.J.—There must be no rule. It was a presumption of fact that the testator destroyed his will, *animo cancellandi*; and evidence of a contrary intention is admissible to rebut that. The declarations of a man are cogent means of discovering his intention, and means to which the mind at once reverts. The cases cited by Mr. Kemplay show that.

BYLES, J.—The declarations of a testator are a part of his conduct.

KRATING, J.—I should be very unwilling to throw any doubt on the matter by granting a rule.

Rule refused.

C. P.) BARKER v. THE METROPOLITAN
7 Nov. 1864.) RAILWAY COMPANY.

Lands Clauses Consolidation Act, s. 68—Land taken—Delivery of Key.

B, a leaseholder, sublet to T from year to year. A railway company paid T compensation for his interest and to go out, T giving up to the company the key, and they indemnifying him against future rent. The company never actually entered. Four days after T was compensated, B claimed compensation under section 68 of the Lands Clauses Act, and as the company failed to take steps to summon a jury, sued them for her claim. The jury found that the land was taken under the Act and for the purposes of the Act:—

Held, that there was evidence to support the finding.

The plaintiff, Mrs. Barker, was possessed of a leasehold interest in a house and yard for 96 years from Michaelmas, 1825, and one Taylor was her under-tenant from year to year. In 1860 the defendants, wishing to acquire the property, had it valued, and gave their bond, under section 85 of the Lands Clauses Act, the plaintiff then claiming 600*l.* for it. The defendants, however, proceeded no further at that time. Subsequently the defendants paid compensation to Taylor, the tenant in possession, not by assessment or award, but by agreement, and in consideration of this Taylor gave up his interest, and agreed to go out. The agent of the company, who had to pay the compensation, refused to do so until Taylor gave up the key of the premises, and this Taylor accordingly did, on consideration that he should be indemnified by the defendants from future payment of rent. Taylor gave up the key on these terms about Christmas, 1864, having paid his rent up to that time; and no rent was paid afterwards. Four days after Taylor received compensation—viz., on the 1st of February, 1864—the plaintiff served a notice on the defendants that she claimed 850*l.* compensation for her property, under the 68th section of the Lands Clauses Act, and that the defendants were to take steps for summoning a jury. The defendants did not issue their warrant to the sheriff within twenty-one days of such claim, and thereupon the plaintiff sued them for the compensation claimed. At the trial the jury found that the land was taken under the Act, and for the purposes of the Act, and awarded the plaintiff 850*l.*, the amount of her claim.

8 Vict. c. 18, s. 68 (the Lands Clauses Consolidation Act, 1845) provides that "If any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction, &c., and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same

settled either by arbitration or by the verdict of a jury . . . if the plaintiff so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire, to the promoters of the undertaking . . . and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the Superior Courts."

Keane, Q.C., now moved, pursuant to leave reserved, to enter the verdict for the defendants, on the ground that there was no evidence to support the plaintiff's claim.

The word "taken" in the Act means a specific taking, and not the mere acquirement of a right to take. All the sections of the Act which throw a liability on the company are framed on the supposition that there is an actual entry and user by them for their own purposes,

Burkinshaw v. The Birmingham and Oxford Junction Railway Company, 5 Exch. 475.

Taylor gave up the key on the terms that he should be indemnified for future rent.

ERLE, C.J.—I am of opinion that there should be no rule in this case. The land is, in fact, taken by the defendants, and if within twenty-one days they do not issue their warrant to the sheriff to assess the value, the plaintiff is entitled to the amount she claims. This warrant was not issued, the plaintiff proves her title to the land, and the case clearly comes within the 68th section.

BYLES, J.—The Act says "any land or interest therein which shall have been taken." The title was not disputed, and the land was taken.

KEATING, J.—The question was properly put to the jury, and they found that the defendants took the land.

Rule refused.

C. P. }
8 Nov. 1864. } *ROBINSON v. COLLINGWOOD.*

Bills of Sale Act—Registration of Defeasance,
&c.—17 & 18 Vict. c. 36, s. 2.

The defeasance, condition, or declaration of trust required by 17 & 18 Vict. c. 36, s. 2, to be registered, is that only in which the giver of the bill of sale has an interest; and it is not necessary to register a trust between the assignee of the bill of sale and a third person.

This was an interpleader issue directed by Willes, J., to try the right to certain goods which were seized in execution by the sheriff of Middlesex in February, 1864, under a *f. fa.* on a judgment in an action of *Collingwood v. Berkeley*.

At the trial before Williams, J., at the Guildhall, a verdict passed for the plaintiff. The goods in dispute consisted of the furniture, &c., in the house of Mr. Berkeley, which Robinson claimed under two bills of sale, and Collingwood as execution creditor. The first of these bills of sale, dated the 14th of August, 1861, was an absolute one by the sheriff of Middlesex, who had then seized Mr. Berkeley's goods, and was paid out by Robinson. The second bill of sale, dated the 27th of February, 1863, was a conditional one from Berkeley to Robinson direct, and both bills of sale were duly registered. Robinson was a solicitor; and though the bills of sale were in his name, the money, which was the consideration for them, was really furnished by Montagu, a friend of Berkeley's, without the knowledge of the latter. This fact was not registered.

17 & 18 Vict. c. 36 (the Bills of Sale Act), section 1, provides that bills of sale shall be void, unless the same, or copies thereof, be filed as the Act directs. Section 2 enacts, "If such bill of sale shall be made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this Act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such bill of sale shall be null and void," &c.

Keane, Q.C., obtained a rule to set aside the verdict for the plaintiff and enter it for the defendant, pursuant to leave reserved, on the ground that on the evidence the requisitions of 17 & 18 Vict. c. 36, s. 2, had not been complied with.

Henry James and B. Webster now showed cause.

The object of the Act is that bills of sale given long before shall not be produced at the last moment to defeat executions: and therefore the giver and receiver must be registered. Then, if there be any trust in the giving or making, if the assignee be trustee for the assignor, that too must be registered. But the Act only applies to trusts between the assignor and assignee of the bill of sale; and it is quite immaterial for the purposes of detecting fraud what may be the trust subsisting between the assignee and a third person. If Robinson had executed a deed contemporaneously with the bill of sale settling the property on his children, that would not concern the execution creditor. It would be absurd to register the mere deduction of a Court of Equity, which would be the case with the implied trust here.

Bovill, Q.C., and *Keane, Q.C.*, in support of the rule.

The object of the statute is, that all the facts should be disclosed.

[**BYLES, J.**—Your argument goes to this : that if a man be trustee for children, and advance the money, he must register his *cestuis-que-trust*.]

The register must show not only the person to whom, but "in whose favour" the bill of sale is given (section 3).

ERLE, C.J.—I am of opinion that the bill of sale is valid, notwithstanding the statute 17 & 18 Vict. c. 36, s. 2. That statute requires registration of any condition or trust in which the grantor or giver of the bill has an interest. The object was to remedy the evil of debtors giving bills of sale apparently transferring all their property, and which would be used to defeat the creditors, while in reality there was some concealed trust in favour of the giver of the bill. The execution creditor, or the assignees of a bankrupt, have no interest in knowing whether or not the grantee of a bill of sale is trustee for others. The execution creditor here was not interested to know in what relation Robinson stood to Montagu.

BYLES, J.—I am of the same opinion, and I have derived my view of the statute from the observations of Mr. James. It would be quite unnecessary to register any other trusts than those between grantor and grantee. Otherwise it would come to this : that where a man is trustee under a complicated trust, the bill of sale would be void, unless all the particulars of that complicated trust were given. The words "to whom or in whose favour" the bill is given include all cases.

KEATING, J.—It is clear that the object of the statute is satisfied by requiring the registration of all declarations of trust in favour of the original debtor.

Rule discharged.

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| Ex. | } | Re DOMINGO CAPDEVIELLE, Deceased. |
| 28, 29 MAY, | | |
| 13 JUNE, 1864. | | |

Domicil—Succession and Legacy Duty—Personality of Foreigner in England.

C, a native of France, died in 1859, leaving personality in England. Having left his country early in life, C came in 1830 and settled in business at Manchester, where he continued to reside until his death. In the interval, he twice, for a short time only, visited his native country. He bought an estate at his native village, subscribed to local charities, and often expressed an intention to return to France. By his will he left all his property, real and personal, to his nephew :—

Held, by MARTIN and CHANNELL, BB. (POLLOCK, C.B., and BRAMWELL, B., dubitantibus), upon the authority of Moorhouse v. Lord, 10 H. of L. Ca. 272, and 1 H. R. 555, that C's domicil was French ; he not

having done all in his power to divest himself of his original domicil :

Held by the COURT, in accordance with the decision in Re Wallop's Trusts, ubi supra, that the personality in England was subject to succession duty.

This was a proceeding by way of writ of summons against the executor of the deceased under the 16 & 17 Vict. c. 51, s. 48 (the Succession Duty Act), and the Legacy Duty Acts, to compel the delivery of an account of the legacies and property of the deceased Domingo Capdevielle, and payment of the duty chargeable thereon.

The following is a short statement of the facts.

Domingo Capdevielle, the testator, was a native of Montory, in France, and he left his country prior to the year 1807 or 1808, to avoid the conscription, and went first to Spain, and thence to Gibraltar. In 1830 he came to England to commence the business of a commission agent at Manchester, and continued it there till the 6th of January, 1859, when he died. During his residence in Manchester he lived in various furnished lodgings, which he hired by the week. He was twice in France between the year 1830 and the time of his death. In 1846, the testator, being then in France at his native place, bought a house and land there for about 5000*l.*, and from that time until his death this house was kept up at his expense and superintended for him by a niece of his, who resided in it. After 1846, however, he never again visited his native place.

Various portions of the correspondence between the testator and his niece and other persons in his native country were relied upon by the executor to show that the testator had no intention to forsake his domicil of origin. The will described the testator as of No. 3, Arthur Terrace, Higher Brompton, near Manchester, merchant, and thereby the testator devised and bequeathed all his estate, real and personal, to his nephew, whom he also appointed his executor.

It appeared from affidavits that the testator had frequently expressed his intention to return to his native country ; that when at his native place he executed a formal act for the purpose of preserving certain rights of succession ; that he subscribed to the charities of his native place ; that he retained the right of voting in elections of members of the Corps Legislatif ; and that he always considered himself to be a French subject.

Bovill, Q.C., and C. Pollock, now showed cause.

Thomson v. The Advocate-General, 12 Cl. & Fin. 1, shows that legacy duty depends upon the domicil of the testator.

We say that the domicil here continued to be a French one, and, in any case, the onus of proof rests with the Crown. The facts, however, show that the testator did not intend to change his domicil. The cases are numerous on the point,

Munro v. Munro, 7 Cl. & Fin. 876 :

Hodgson v. De Beauchamps, 12 M. P. C. C. 814.

[CHANNELL, B., referred to
Moorhouse v. Lord, 10 H. of L. Ca. 272, 282, 283 ;
1 N. R. 555.]

[POLLOCK, C.B.—The word "domicil" is not to be found in any of the old books.]

2ndly. Assuming that the testator had a French domicil, the property is not subject to succession duty. The Succession Duty Act, 16 & 17 Vict. c. 51, was intended to apply only to property not liable to legacy duty, and was not meant to include personal property in England belonging to a man with a French domicil. The word "exemption," in the 18th section, means "not liable to."

Boosey v. Jefferys, 6 Exch. 593 ;

Attorney-General v. Fitzjohn, 2 H. & N. 465.

The cases of

Aikman v. Aikman, 3 Macq. 854 ;

Bremer v. Freeman, 1 Deane & S. 192 ;

Brown v. Smith, 21 L. J. (N. S.) Ex. 356 ;

Somerville v. Somerville, 5 Ves. 787 ;

Re Bruce, 2 Cr. & J. 436 ;

Re Steer, deceased, 3 H. & N. 594 ;

La Virginie, 5 Rob. Ad. 98 ;

Re Wallop's Trusts, 3 N. R. 679 ; 33 L. J. Ch. 351 ; and

Re Lovell's Settlement, 4 De G. & J. 347,

were also cited and commented upon.

The Attorney-General, The Solicitor-General, and Beavan, for the Crown.

Upon the question of domicil, in addition to the above cases, they cited,

Phillimore on Domicil, 11, 122, 144 ;

Whicker v. Hume, 13 Beav. 395 ;

Attorney-General v. Rowe, 1 H. & C. 42 ;

Story's Conflict of Laws, p. 50, s. 42 ;

Bruce v. Bruce, 2 B. & P. 229 n. ;

Cockerell v. Cockerell, 2 Jur. (N. S.) 727 ;

Lyall v. Paton, 25 L. J. Ch. 746.

The cases of *Re Wallop's Trusts*, and *Lovell's Settlement* (*ubi supra*), prove that succession duty is, at any rate, payable. The case of *Thomson v. The Advocate-General* (*ubi supra*), was decided upon certain particular words in the Act.

Arnold v. Arnold, 2 Myl. & C. 256, was also cited.

Cur. adv. vult.

MARTIN, B.—I may state, my Brother Channell and myself entirely concur in this judgment ; but that Pollock, C.B., and my Brother Bramwell, who also concur that the judgment ought to be for the Crown, think that there is some difficulty with respect to the question of domicil, arising from the circumstances which they will state.

There are two questions in this case. 1st. Was the testator, Domingo Capdevielle, domiciled in England ? This is a question of fact, to be determined upon affidavits which have been produced by the executors, and which I think we are bound to consider as sub-

stantially true. We have no reason to suppose they are otherwise. They state that the testator was born in France, and left that country prior to the year 1807 or 1808, to avoid the conscription. He first went to Spain, and thence to Gibraltar, and in 1830 came to England to commence the business of a commission agent at Manchester, and continued it till the 6th of January, 1859, when he died. He was twice in France during that period, and purchased some real property there. I think it is a true and fair inference from the affidavits, that, during the whole time his mind and intention were to return to France and die there, although he never determined or fixed upon the period when his return should take place, and that he was living in Manchester with the intention of remaining there for an indefinite period, but during all the time he had the hope, expectation, and intention of returning to France and there ending his life ; and that he always deemed and considered himself to be a Frenchman, and not an Englishman. The question whether he was domiciled in England, depends on what is the true definition of domicil in regard to testamentary acts. In Story's Conflict of Laws, c. 3, s. 56, it is said : "That if a person has actually removed to another place, with an intention of remaining there for an indefinite term, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return to his native country at some future period." If this be the true definition of domicil, the testator was domiciled in England, for he had removed to Manchester, and lived there for twenty-nine years. His intention was to remain there for an indefinite time, as his fixed permanent domicil ; and although I believe he had always what may be called a floating intention to return to France at a future period, yet this, according to the above intention, would not prevent the English domicil.

There are also two other definitions of domicil—one in the same work, c. 3, s. 43—namely : "That that place is properly the domicil of the person in which his habitation is fixed, without any present intention of removing therefrom." The other, in Dr. Phillimore's Book on Domicil, c. 2, s. 15, p. 13, namely : "A residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." If these be correct, the domicil of the testator was English ; but, on the other hand, there is a definition of domicil, by Lord Wensleydale, in *Aikman v. Aikman* (3 Macq. H. L. Cas. 877), which, if correct, seems to me to establish that the domicil of the testator was French. It is this : "Every man's domicil of origin must be presumed to continue until he has acquired another sole domicil by actual residence, with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burthen of proof unquestionably lies upon the party who asserts the change."

Now, if this be the correct definition of domicile, the testator's domicile was French; for I think the undoubted inference from the affidavits is, that he never had the intention of abandoning his French domicile: on the contrary, he always desired to retain it, and it may be predicated with absolute certainty that the Attorney-General did not establish the contrary. But it was said that Lord Wensleydale was not to be understood as intending what his words seemed to express; but it seems to me clear, from the case of *Moorehouse v. Lord* (10 H. of L. Ca. 272; 1 N. R. 555), decided last year, that Lord Wensleydale was understood by the noble and learned Lords who delivered judgment in the sense which his words naturally mean. The three Lords who delivered judgment (Lord Cranworth, Lord Chelmsford, and Lord Kingsdown) all go into the question of domicile. Lord Cranworth clearly intimates that the old view as to domicile was not correct, and that modern improved views exist. He says, "In order to acquire a new domicile, &c., a man must intend *quatenus in illo exuere patriam*. It is not enough if you take a house in another place, and that it is tolerably certain that you had better remain there all the days of your life; that does not signify. You do not lose your domicile of origin merely because you go to some other place that suits you better, unless you mean to cease to be a Scotchman and become an Englishman, or a Frenchman, or a German. In that case, if you give up everything you leave behind you, and establish yourself elsewhere, you may change your domicile." It is, therefore, clear to my mind that Lord Cranworth entertained that view as to domicile, which the words of Lord Wensleydale naturally, in their ordinary meaning, import. Lord Chelmsford is, if possible, still more clear. After stating that two definitions of domicile which had been mentioned were, in his opinion, liable to exception, he proceeds, "The present intention of making a place a permanent home can exist only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, and which might induce him to change his residence. If he has in his contemplation some event, upon the happening of which his residence will cease, it is not correct to call this even the present intention of making it his permanent home. It is rather the present intention of making it a temporary home, though for a period indefinite and contingent; and even if such residence should continue for years, the same intention to terminate being continually present in the mind, there is no moment of time at which it can be predicated that there has been a deliberate choice of a permanent home. In a question of change of domicile, the attention must not be too closely confined to the nature and character of the residence, by which the new domicile is supposed to have been acquired. That may possibly be of such a description as to show an intention to abandon the former domicile, but that intention must be clearly and unequivocally proved." He then clearly adopts

Lord Wensleydale's definition as I understand it, and states it at length. Lord Kingsdown expresses his concurrence with the other judgments, and added, "Upon the question of domicile, I would only wish to say, that I apprehend that change of residence alone, however long it continued, does not affect a change of domicile as regulating the testamentary acts of the individual. It may be that it is a necessary ingredient. It may be, and it is strong evidence of an intention to change the domicile; but unless, in addition to residence, there is an intention to change the domicile, in my opinion, no change of domicile is made." I adopt the definition of Lord Wensleydale. I think it approved of by the three noble and learned Lords whose opinions I have quoted, and as I think there is no evidence of intention of the testator to change his domicile, in my judgment, the domicile of the testator was French.

The other point is, whether, assuming the domicile to be French, succession duty be payable. The argument on behalf of the executor is very clear, and apparently cogent. The debt is claimed in respect of the legacy of personalty. The testator is to be taken as having a French domicile. The rule is, that *mobilia et personalia sequuntur personam*. It is said, therefore, to be the same, as if a will had been made by a Frenchman who had never been out of France in his life, and all his personalty had been locally situate there. The House of Lords in *Thomson v. The Advocate-General*, in the 12th Clark and Finelly, has acted upon this principle, and has conclusively decided that legacy duty is not payable in respect of the present bequest: and there is certainly no expression to be found in the Succession Duty Act, to show an intention to alter the law. The House of Lords there put a limitation on the words, "Every legacy given by any will to any person," and we are urged to put the same limitation upon the words "every disposition" in the 2nd section of the Succession Duty Act. On the other hand, the case of *Wallop's Trust*, decided by the Lords Justices, on the 11th of March, in the present year, was cited by the Attorney-General. It was the case of an appointment by will of personalty by the donee of a power domiciled in Jersey, the power being created by the will of a testator domiciled in England. The Lords Justices held succession duty to be payable. It was said that this case was not in point, inasmuch as the legacy was under a power to take effect by virtue of the will of the testator, who was domiciled in England, Lord Justice Turner, however said, in the most express and direct terms, that this was not the ground of his judgment, and that, in his opinion, the legatees of persons domiciled out of Great Britain, and the appointees of donees of powers so domiciled, were intended to be, and were subject to succession duty by the 2nd section of the Act. This case is, in substance, in point, and I think we ought to be bound by it; and if it be wrong, it should be set right by a

Court of appeal, and not by one of co-ordinate jurisdiction.

BRAMWELL, B.—I also agree in thinking that the Crown is entitled to judgment, and I cannot say I dissent from the reasons the other members of the Court have given for their opinion; because I am so unable to form any opinion myself to which I can attach any value, that I would subscribe to any which I found formed by those whose opinions I respect so much as my Brother Martin and my Brother Channell. I wish to state the reasons of my hesitation and difficulty in this matter.

Here is a question which arises on an English Act of Parliament, namely, whether a certain legacy is subject to duty? I entirely concur with my Brother Martin in his appreciation of the facts of this case with reference to the question involved. The question argued here, as in all other cases with reference to legacy duty and the Legacy Duty Act is, whether a man was domiciled in England? Now, the word "domicil" is not to be found in the statute; but still if by authoritative decision the statute is to be limited to cases where a man is domiciled in England, then no doubt our duty is reduced to ascertaining whether or no he is so domiciled; but then, though you may admit that that is the case, yet if it lands you in a state of uncertainty, you may escape from danger on account (to my mind) of the extreme difficulty of saying what does constitute an English domicil. Now the definitions, with the exception of one, which has been given of an English domicil would comprehend this case and make the deceased domiciled in England, and certainly all the authorities about Anglo-Indian domicils would go in the same direction; and there is but one authority to my mind to the contrary, and that is the decision of the House of Lords in the case so often mentioned, which I think is the case of *Moorhouse v. Lord*. Now, no doubt, in the judgment pronounced by the noble Lords there, and in the words of my Lord Wensleydale in the previous case of *Aikman v. Aikman*, there is a great deal to show that the deceased had not an English domicil, because he certainly had not done as much as in him lay to give up the English domicil, because he always had, according to my appreciation of the facts, and I concur with my Brother Martin, an intention, hope, and expectation of going back to France and perhaps dying there. But then, of course, if I felt satisfied that the House of Lords had so decided, I should trouble myself with no further reasoning on it, but follow, as I am bound to do, that decision. But there are two difficulties in reference to that decision and the opinions there expressed. One is that it is inconsistent with the former cases of Anglo-Indian domicil, and yet it does not in express terms overrule them, or take any notice of them; another is, that the expression used, with very great deference, must be considered to be too extensive;—to say that a man

cannot give up his English domicil without doing all that in him lies to give up his country. I should, with very great submission, think that expression cannot be maintained; because it scarcely can be said that in the ordinary case of a person, either an Irishman or an Englishman, emigrating to the United States, if a person of the labouring class, with the ordinary intention, and hope, and expectation that he should be not naturalising himself therein, in order that he might escape, and from a fear that if he did he should be subject to conscription, and being quite ready to claim the protection of the English ambassador to prevent his being made a conscript, but having no other intention to remain or continue a British subject, or retain his hold on the country, I think it cannot possibly be said that if the man died in America he did not die domiciled there, though he would not have done all that in him lay to give up his country. I say, therefore, I have a great difficulty (supposing those noble and learned Lords intended to overrule previous cases) in supposing that they intended anything which would be comprehended within the very expression they have used. Well, then, that being so, one cannot help looking a little at the Act of Parliament, and of course one does not quarrel with the words. As I said before, if this word "domicil" was put in, and if I appreciate the expression, that is enough; but on looking at it, it is not there. On looking at the Act of Parliament, you find it imposes a duty on legacies; and, no doubt, the general words of the statute must be restricted to that which is properly the subject of a British legacy—that is to say, British personal things—and does not apply to a foreigner, or to an Englishman in the nature of a foreigner—that is to say, to use the expression, domiciled abroad. I am quite content to suppose the rule is a reasonable one—namely, that personals follow the owners. But here is the case of a man who had left his country more than half a century ago, who had lived in England thirty years, and must have attained an old age; had had his place of business here, made his property here, invested it (not all of it) here, made a will here which required probate in our Courts, and left property to a legatee here. Then why, in reason, should not the property pay the legacy duty, by a legatee living here, and taking it here, under English authority, as the present legatee has done? If one looks at the reason of the thing, I own I cannot see why it should not be the subject of legacy duty. Then, that being so, I have very great difficulty in saying that, probably, from my own unassisted judgment, I would have come to the conclusion that this was a case where the legacy ought not to pay the legacy duty, because the man was a Frenchman, has been treated as a Frenchman, and ought to be treated in the same way as a man who had never been in England, whose property was not here. I have very considerable difficulty about that, because I have a difficulty either upon the reason of

the thing, or on the belief that the Anglo-Indian cases are overruled; whilst on the other hand, I have a difficulty the other way on account of the large expression used by the peers in the House of Lords. But then it is said, that if he escapes the legacy duty, he comes within the succession duty; and cases are cited accordingly. And although I have very great faith in, and respect for, the authority of the Judges who pronounced an opinion in accordance with that view (it certainly was not very actively concurred in by my learned Brothers), I confess I have a great difficulty in following that authority for that reason, and it does seem to me, that whatever arguments can be used for the purpose of showing that the Legacy Duty Act must be restricted to persons and things, the subject of British legislation, to the extent of exonerating parties in such a case as this from the legacy duty, is equally applicable to the Succession Duty Act; and the Succession Duty Act equally requires a restriction in its construction as the Legacy Duty Act, because everything that is true of the one is, to my mind, true of the other. Here you have a difficulty as much as you have in the case of legacy duty; and I cannot see why the same reasoning should not apply to legacy duty that applies to succession duty. Therefore, I have a considerable difficulty in following that. I say, and I say unfeignedly, while I have thought it right to give expression to the doubts I entertain, I feel myself so embarrassed in forming an opinion, that while I certainly agree in the conclusion that my Brother Martin, and my Brother Channell, have arrived at, I cannot say I differ even in the reasons they have given for it.

POLLOCK, C.B.—I agree with the rest of the Court, that our judgment ought to be for the Crown; but the grounds of my decision will be not precisely the same as those which have been delivered by the rest of the Court. I think that the Attorney-General's argument was well founded; and, I think, he established to my satisfaction, that we ought to consider that the domicile of M. Capdevielle, a Frenchman, who had resided here for a very long period, who had amassed his property here, was a merchant here—that his domicile was English; and that, therefore, upon his death administration could be taken out here, and his effects are liable to be distributed according to the English law and subject to English duty. But I cannot say that I am perfectly satisfied that that decision is quite in accordance with, certainly, some recent authorities. This is the last day of Term; the Crown, I think, is entitled to our judgment during this Term, and, though I have a very clear view of the grounds on which I shall express my opinion, I concur in giving my judgment along with the rest of the Court. I own, if I had to state all the doubts to which the question gives rise, I should require a longer time to state them at length; and I distinctly say that I feel myself called upon to give

judgment now, as I am doing, without pronouncing a written judgment.

The question of domicile is a very large one; and it is not very easy to ascertain authoritatively all that belongs to it, particularly when you apply it to English law. It is certainly somewhat remarkable that domicile is now very frequently the subject of discussion in our courts; and, as we have more than once observed, the word "domicil" is comparatively entirely new to the English law; neither the word, nor the notion that belongs to it, has anything English about them. Neither the word nor the status is to be found in any English work from Bracton down to Blackstone; the word is not to be found in any English law-writer certainly about a hundred, or, I believe, about fifty years ago: the word does not occur in Viner's Abridgment, in Bacon's Abridgment, in Comyn's Digest, or in any book whatever, except entirely of modern date; and, in truth, in the English law we know nothing about it. An English subject is domiciled in every part of the British dominions. There is no distinction of domicile at one place and domicile at another. The rights of a British subject are co-extensive with the British dominions. That is not so in those countries where the law of domicile prevails. There a man is domiciled at the particular part of the dominions to which he belongs; and there are certain acts which he cannot perform unless in the part of the country which is his domicile; but the English law knows no such disability. An English subject may marry in any part of the British dominions; he may make a will anywhere; he can do many acts which, in foreign countries where the law of domicile prevails, he can only do at his own domicile, at that part of the country to which he belongs—where he is domiciled. Now it is admitted that there may be more than one domicile for certain purposes. I apprehend that a nobleman in this country who is a peer of Scotland and also a peer of England, who has estates in both countries, who comes up to Parliament to discharge a public duty here, and goes down into Scotland to enjoy the country there, is completely domiciled both in England and in Scotland; and I believe—though perhaps it might not be right to refer to any private communication—but I know a lawyer of the greatest eminence who was in this Court, and is now a member of the House of Peers, to whose opinions my learned brothers, I know, in common with all the profession, attach the highest importance, distinctly to me admitted that it was a fact—that for some purposes a man may have a domicile in both Scotland and England; and I cannot conceive how it can be otherwise. I cannot understand how it is possible to say a man may not be domiciled in Scotland and also in England, as far as we know anything about it. Why should not the same occur with reference to commerce and manufactures, and for every other purpose whatever? I see nothing in the nature of domicile to prevent that. Suppose, for instance, a person connected with both

countries, of French parents, born in England, and therefore a domiciled French subject, but born in England, his *domicilium* of origin, as far as our law is concerned, I believe, would be English. I believe it would not be so in France; for there a man is not domiciled according to the place where he is accidentally born, as is the case with us. If French parents are travelling, and in the course of their journey they have a son, the son is French, not English; he would be English according to birth with us. I cannot see why, in reference to the extent of commerce and the intercourse of nations, and looking forward to what is existing in the minds of many people, if a man has a large establishment—a commercial establishment—in this country, and also a large commercial manufactory in France, having no intention whatever with respect to either country, except this—to make the most money he can in both, I cannot conceive why we should not say that he is for these purposes—for the purposes of the particular establishment of which he may be a member or a sole proprietor there—domiciled in both; and that the English property is to be administered according to the English law, and the French property according to the French law. I must, however, admit that, somehow or other, and I really cannot tell for what reason, there has crept in a notion that, though there may be three sorts of domicile, which there are in France, there can only be one domicile for the purpose of the administration of the property and effects. I cannot conceive what reason, what absolute necessity there is, for any such distinction; and with reference to the case I have adverted to, of the same person having large establishments in both countries, and not particularly attached to either by residence or anything else, I cannot conceive why he should not be considered, for the purpose of domicile, to have a domicile in both. Now the conclusion to which the authorities would lead one, if you look at the authorities, is, that there can be no doubt this gentleman was domiciled in England. If you look to the cases of Anglo-Indian domicile, where persons in the East Indies acquire large property, that property is considered not subject to British taxation, because the domicile was Anglo-Indian, as it is called, and wholly that; and there have been cases, which it would be idle to enumerate, of Anglo-Indian domicile which have been considered as exempt from taxation because the party had resided out there and had died there; but there can be no doubt whatever in every one of those cases the parties had an intention to return to this country, and here to spend the remainder of their days, if they lived long enough to return with health and with the fortunes they had acquired; and I very much doubt whether it was the intention of the noble Lords who came to that decision in the House of Lords, which has been so much referred to—I doubt whether it was their intention to say the decisions in the cases of Anglo-Indian domicile were all wrong. I think the argu-

ments of the Attorney-General before this Court were sufficient to satisfy the Court: they certainly satisfied me that the domicile of this gentleman was English and not French. At the same time, looking at the authorities to which my learned brothers have adverted in the House of Lords, there can be no doubt, I think, that they are correct in saying that the opinions of the noble and learned Lords who decided that case about the Scotch domicile, certainly conveyed the notion that in their opinion Story was wrong, and a new definition of domicile may be given and be acted on in this country. The judgments of any Court (and the judgments of the House of Lords are not exempt from this observation) are binding as judgments only so far as the judgments necessarily determine some certain point in them; they are not binding for the reasons that are personally given by each of the noble Lords, though they should all concur in giving the same reasons. If the reasons for a judgment be not necessarily bound up with the decision, so as to be a necessary part of it, it is no doubt an authority of which no one ought to speak lightly, and to which in my judgment, every Judge ought to defer, if he can, but he is not bound to do so; he is bound, undoubtedly, by the judgment, or what may be called its essence and its principle, on which he must act. I should have come to the same conclusion, precisely as the noble Lords did in the case referred to—the Scotch domicile case; and I should have come to precisely the same conclusion without thinking it necessary to introduce a new definition of domicile, and to speak of some doctrine of domicile being regarded as a kind of discovery within the last few years, as if Story was no authority at all, and all the antecedent writers upon the subject were wholly wrong. I own I am not of that opinion. I am very much disposed to think that the definition of Story is for all practical purposes (and all law, be it remembered, is of importance only as it is practically applicable to the affairs of human life) the most reasonable and practical of any definition that I am aware of. Seeing that the definition given by Lord Wensleydale is not necessary for the decision of the House of Lords in the case referred to, I am not disposed to adopt it in this case. I am rather disposed to adopt the arguments of Sir Roundell Palmer, the present Attorney-General, and to agree with him that he has established that the domicile in this case is English, and therefore the Crown is entitled to the duty.

Well, but supposing the domicile would be French, there is a decision in the Court of the Lords Justices which decides that it is still liable to duty. Now I think the authority of that Court is very much to be regarded: it is not a Court of co-ordinate jurisdiction with this Court in matters of revenue, but the authority of the learned persons who compose that Court is of great weight indeed. I certainly think, if the domicile were French, I should have very consi-

derable doubt in deciding that this property was liable to our succession duty ; but I so far respect the opinions of the learned persons who gave the judgment in question, that I should be disposed, for my own part, to adopt their decision, though I have very great doubt whether it be the correct one. But whether one takes one view of the case or the other, if the domicile be French, if the decision of the Lords Justices be correct, the Crown is entitled to our judgment. So, if the learned Attorney-General be correct in saying the domicile is English, which I think is really the correct

view of the subject, then, no doubt, the Crown is entitled to our judgment. I therefore concur with the rest of the Court in giving judgment for the Crown, and I have thought it right to make these remarks, concurring in that view of the case, because there are many parts of the argument as to the principles that are involved in our decision, which I think by no means free from doubt. Therefore judgment will be for the Crown.

Judgment for the Crown.

EQUITY.

Lord Chancellor. } *Re BARKER.*
 9, 10 Nov. 1864. } *Ex parte GORELY.*

Fire Insurance—14 Geo. 3, c. 78, s. 83—Extent of Clause—Trade Fixtures.

The 83rd section of 14 Geo. 3, c. 78, requires and authorises insurance offices, on the request of any person interested in any house or other buildings damaged by fire, or upon suspicion of fraud, to cause the insurance moneys to be laid out in reinstating the premises:—

Held, first, that this clause applies to the whole realm:

Held, secondly, that it does not apply to money insured upon trade fixtures.

This was an appeal from the decision of Mr. Commissioner Goulburn in a special case stated under the 56th section of the Bankruptcy Act, 1861.

By an indenture of lease dated the 31st of December, 1861, certain premises in Dover were granted and demised by Charles Gorely to John Barker for the term of twenty-one years from the 6th of January then last. The indenture contained a covenant by the lessee to yield up the premises, together with the trade and other fixtures, at the expiration of the term, and a covenant to insure the premises in the lessor's name, for at least three-fourths of their full value, and it was agreed that the moneys so insured should be laid out in reinstating the premises. There was also a clause enabling the lessor to re-enter and determine the lease in case the lessee should abscond.

In accordance with this indenture, Barker effected an insurance in the Alliance Office for 1000*l.* in the lessor's name.

By an indenture dated the 3rd of December, 1862, Barker mortgaged the premises to Messrs. Leney & Eveuden, to secure 500*l.* and interest. In such mortgage there was a provision empowering the mortgagees to insure, and retain their debt out of any moneys paid under such insurance; and accordingly the premises were insured by them in the Sun Office for 500*l.*

Barker also effected in the Phoenix Office an insurance in his own name for 350*l.* on the stock and fixtures in trade, for 150*l.* on household goods and furniture, and for 450*l.* on buildings erected on the premises.

The property thus insured having been destroyed by fire, the lessor and the mortgagees required the Phoenix Office to lay out the 450*l.* insured upon the buildings, and 150*l.*, being such part of the 350*l.* insured upon the stock in trade as represented the fixtures, in reinstating

the premises. The residue of the insurance money was paid by the office to Barker. Shortly afterwards Barker absconded, and Gorely thereupon entered on the demised premises, and determined the lease.

Arrangements had been made for expending the 1000*l.* received from the Alliance Office, and the 500*l.* received from the Sun Office, in reinstating the premises. They had been assented to by the mortgagees in consequence of their belief that under the Act hereinafter referred to the lessor could compel the 500*l.* to be so expended.

Barker having been adjudicated a bankrupt, the 450*l.* and 150*l.* due from the Phoenix Office had, by agreement, been paid to the assignees, to abide the opinion of the Court.

The 83rd and 84th sections of 14 Geo. 3, c. 78, were as follows—

“LXXXIII. And in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted, by the authority aforesaid, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorised and required upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings, so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days after his or her or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses or other buildings are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be in that time settled and disposed of, to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.”

"LXXXIV. And whereas fires often happen by the negligence and carelessness of servants, be it therefore enacted, by the authority aforesaid, that if any menial or other servant or servants through negligence or carelessness shall fire or cause to be fired any dwelling-house or outhouse or outhouses, or other buildings, *whether within the limits aforesaid, or elsewhere within the Kingdom of Great Britain, servant or servants,*" &c.

The 83rd section was enacted in substitution for a similar provision in an earlier Act, 12 Geo. 3, c. 73, s. 34, which was as follows—

"And in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted, by the authority aforesaid, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices, *within the limits aforesaid*, for insuring houses, or other buildings, against loss by fire, and they are hereby authorised and required upon the application and request of any person on persons interested in or entitled unto any house or houses, or other buildings, *within the limits by this Act prescribed*, which hereafter shall or may be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings, have been guilty of fraud, or of wilful setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings, so burnt down, demolished, or damaged by fire, unless the party or parties claiming such insurance money shall, within sixty days next after his her or their claim shall be adjusted, give a sufficient security to the governors or directors of the insurance office, where such house or houses or other buildings are insured, that the same insurance money shall be laid out and expended as aforesaid, or unless the said insurance money shall be in that time settled and disposed of, to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

The 7 & 8 Vict. c. 84, repealed generally the 14 Geo. 3, c. 73, but excepted certain sections, including the 82nd, 83rd, 84th, and 86th sections, the last section having reference to legal proceedings in respect of accidental fires.

The material question for the consideration of the Court was, whether the 500*l.* paid by the Sun Office, and the 450*l.* and 150*l.* paid by the Phoenix Office could, in the present case, be compelled to be laid out in rebuilding and reinstating.

F. M. White, for the mortgagees and the lessor.

The question is, whether the 83rd section of the 14 Geo. 3, c. 73, is general or restricted to the limits of the metropolis? We say it is universal; because,

1st. Although the title and general preamble of this Act are so limited, yet the particular preamble of this section points to a general mischief, and the language is clearly general. Thus the 86th section has been held to apply to the whole realm,

Filliter v. Phippard, 11 Q. B. 347.

2nd. The words "*within the limits aforesaid*," which are found in the earlier statute (12 Geo. 3, c. 73, s. 34), are not repeated in the substituted enactment.

3rd. No argument can be drawn from the power given by the 4th section of 7 & 8 Vict. c. 84, of extending the operation of that Act to any place within twelve miles from Charing Cross, as the section of the Act of the 14 Geo. 3, is not incorporated with the Act of Victoria, but is merely left unrepealed.

This question was discussed, but not settled in

Simpson v. Scottish Union Assurance Company,
1 H. & M. 618.

Holl, for the assignees of the bankrupt.

1st. The preamble of the Act of the 14 Geo. 3 defines one of its objects to be the prevention of mischief by fire within certain limits. The 83rd section is pointed to a mischief by fire, and therefore is intended to be confined to those limits. The 86th section, to which an extended application has been given, is not pointed to a mischief by fire.

2nd. No argument is deducible from the omission of the words "*within the limits aforesaid*;" for where, as in the 84th section, which follows the 35th section of the earlier Act, an enlargement is intended, the words, "*whether within the limits aforesaid, or elsewhere within the kingdom of Great Britain*," are introduced.

3rd. The 82nd section, which recites that "*the several offices for insuring houses against loss by fire*" retain watermen in their service, shows that the words "*the several offices, &c.*," though apparently general, apply only to insurance offices within the metropolitan limits. These words must have the same restricted meaning in the 83rd section.

He also referred to

Vernon v. Smith, 5 B. & A. 1 (per Best, J., p. 9).

4th. The usual provisions in leases, that insurance moneys shall be laid out in reinstating the premises, show that the general opinion of the profession is in favour of our contention.

6th. Anyhow, the clause applies only to houses and buildings, and the office could not be called upon to reinstate trade fixtures, which are for the present purpose in the nature of chattels,

Amos on Fixtures, 10;

Dumergue v. Rumsey, 33 L. J. Ex. 83;

Poole's Case, 1 Salk. 368.

F. M. White, in reply.

The words, "house or houses, or other buildings," include fixtures of whatever character; for all fixtures are truly part of the freehold, although in respect of those used in trade, the tenant has, during his tenancy, a power to sever and dispose of them. Here the exercise of this power is shut out by express agreement, and, therefore, the ordinary principle applies,

Walmsley v. Milne, 7 C. B. (N. S.) 115,
and the cases there cited;

Leader v. Holmwood, 5 C. B. (N. S.) 546;

Gibson v. Hammersmith Railway Company, 33
L. J. Ch. 337.

THE LORD CHANCELLOR said, that the case had been very ably argued. The first question he had to decide depended on whether the 83rd section of 14 Geo. 3, c. 78, was universal, or limited to houses and buildings standing within the limits specified in that Act, commonly called the metropolitan limits.

It was material to observe that the section was not re-enacted as a part of the present Metropolitan Building Act (7 & 8 Vict. c. 84). That statute excepted from repeal certain sections of another statute, and of these excepted sections the enactment in question was one. Consequently, the 83rd section of the 14 Geo. 3, c. 78, remained in its integrity by virtue of the old statute. This was important, since although there was a power in the new Act to extend its operation, the premises referred to in this case were not within the Act or any extension of it. If, therefore, they fell within the 83rd section, it must be by virtue of the section itself.

Now it was true that the general preamble to the whole Act (14 Geo. 3, c. 78) referred to buildings within certain limits, and the sections which followed contained enactments carefully restricted to buildings "within the limits aforesaid." But when we came to the 83rd section, we found a special preamble reciting a general evil. The just conclusion was, that because the remedy was intended to be general, it was prefaced by the statement of a general mischief. *A priori*, therefore, one would infer that the enactment would be co-extensive with the evil; and that inference was confirmed when we looked at the language of the enactment, in which the words "within the limits aforesaid" were omitted.

But it was argued, that the 84th section had equally a general preamble, and yet the words "whether within the limits aforesaid, or elsewhere within the kingdom of Great Britain," were inserted in order to render it universal. But if the 83rd section contained in itself enough to ascertain its own universality, it would not lose that quality by reason of its not possessing a particular form of words, not needed for the purpose, which were found in a subsequent section. It was impossible to say that, because redundant words found in another section were wanting in this, therefore it was not universal. This was in accordance with the

decision in *Filliter v. Phippard* (*loc. cit.*). The 83rd section was, therefore, applicable to the present case, and the money referred to by it must be laid out in reinstatement.

But then there arose a minute and somewhat difficult point. The lease contained a covenant that the tenant would deliver up the premises, with the fixtures, at the expiration of the term—a covenant which attached to such fixtures as were on the premises at the end of the term. The term was determinable by the lessee's absconding. The tenant insured the fixtures separately, and these were destroyed by the fire. The 83rd section applied in terms to "houses and buildings" only; and the extent of those words might be collected from the duty of reinstating cast on the insurance offices. The question, therefore, was, when the fire took place were the fixtures in such a legal position that if the lessor had made a conveyance of "all that house and buildings" the fixtures would have passed?

The fixtures were trade-fixtures, and therefore by the ordinary law were removeable by the tenant at the time of the fire. Therefore, the lessor's right at the time of the fire was a personal right springing out of the lessee's covenant, not out of the ownership of the freehold,—a contingent, not a present, right. If, therefore, the moment before the fire a conveyance had been made of "all that house and buildings," the fixtures would not have passed. Therefore, the insurance moneys receivable in respect of the fixtures were not within the 83rd section; but the fruit of the contract as to them was a chattel interest in the lessee, and passed to his assignees. This decision must not be considered as conflicting with *Holroyd v. Marshall* (10 H. of L. Ca. 191). The sole question determined here was, whether the fixtures were so blended with the freehold as to come under the words "house and buildings" as used in this section? They were not a part of the freehold in the sense of being an integral part of the house when the fire took place.

The result was, that of the moneys received from the Phoenix Office 450*l.* would be applicable to rebuilding, and 150*l.* would pass to the assignees. And as the mortgagees had been compelled to lay out the 500*l.* which they received from the Sun for the lessor's benefit, and their security was now gone, they would be admitted to prove for the entire amount of their debt.

Note.—See

2 Dav. Prec. 546.

Lord Chancellor. } TATHAM v. DRUMMOND.
16 JULY, 15 NOV. 1864. }

Charitable Bequest—Statute of Mortmain.

In the administration of charitable bequests the Court ascertains the meaning of the testator by the ordinary rules of construction, without in the first instance

adverting to the existence of the Statute of Mortmain ; and when the intention has been so ascertained, inquiry is then to be made whether the whole, or any part of the intention, is contrary to the provisions of the statute.

A testator bequeathed a sum of money to be applied "towards the establishment, in the neighbourhood of London and Westminster, of slaughter-houses away from the densely populated places in which they are now situated" :—

Held, reversing the decision of Vice-Chancellor Wood, that the bequest was within the Statute of Mortmain, and void.

This was an appeal from a decision of Vice-Chancellor Wood, reported (on the second point) 3 N. R. 707.

Harriet de Horta by her will bequeathed a sum of 20,000*l.* Consols to the treasurer for the time being of the Society for the Prevention of Cruelty to Animals, to be at the disposal of the committee of the society ; and the will then proceeded in the following terms.— "It is my express wish that this sum, and the dividends thereof, be applied by the said committee in such manner as they shall think best towards the establishment, in the neighbourhood of London or Westminster, of slaughter-houses away from the densely populated places in which they are now situate, and for the relief of, and protection from cruelty to, the animals taken to be slaughtered."

By a codicil the testatrix reduced the legacy to 10,000*l.*

The Vice-Chancellor having held that the bequest did not fall within the Statute of Mortmain, the residuary legatees appealed.

Roll, Q. C., and *Cotton*, for the appellants.

The will must be construed in the first instance without reference to the Statute of Mortmain,

Attorney-General v. Williams, 2 Cox, 387 ;

Edwards v. Hall, 11 Hare, 1.

If, upon the construction of the will so ascertained, it appears that building is necessary to carry the intention of the testator into effect, then the gift is within the Statute of Mortmain, and void,

Attorney-General v. Davies, 9 Ves. 535.

Here the testatrix contemplated the erection of slaughter-houses ; and though a school might be established without building, a school-house could not.

They referred to

Attorney-General v. Hull, 9 Hare, 647 ;

Blandford v. Thackerell, 2 Ves. 237*a* ;

Longstaff v. Rennison, 1 Drew. 28 ;

University of London v. Yarrow, 1 De G. & J. 72 ;

Incorporated Church Building Society v. Barlow, 3 De G. M. & G. 120 ;

Carter v. Green, 3 K. & J. 591.

Giffard, Q. C., and *Swanston*, for the Society.

If the canon of construction contended for on the other side be maintained, many gifts which have been upheld would be bad ; e.g., those in ;

Sorresby v. Hollins, 9 Mod. 221 ;

Vaughan v. Farrer, 2 Ves. sen. 182 ;

Johnston v. Pollard, 3 Mad. 457 ;

Crafton v. Frith, 15 Jur. 737 ;

Philpott v. St. George's Hospital, 6 H. of L. Ca. 338.

The gift ought not to be construed so as to be void, if it can possibly be made good ; and there are many ways of carrying out the intention of the testatrix without erecting buildings.

W. M. James, Q. C., *Wickens*, and *Goren*, for other parties.

Roll, Q. C., in reply.

15 Nov. 1864.

THE LORD CHANCELLOR.—In the administration of charitable bequests, it is the duty of the Court to ascertain from the words of the will, by the ordinary rules of construction, the true meaning and intention of the testator, both as to the bequest itself and the mode of carrying it into effect, without, in the first instance, adverting to the existence of the Statute of Mortmain. When the intention of the testator has been ascertained, inquiry must be made whether the whole or any part of that intention be contrary to the provisions of the statute. But no secondary interpretation ought to be adopted, nor ought the Court to resort to any different mode of administration from that indicated by the testator, even though it might be reasonable in itself for the purpose of escaping from the operation of the statute.

All this was well and concisely expressed by the Lord Chancellor in the case of *Attorney-General v. Williams* (*loc. cit.*), "The Court will not alter its conception of the purposes of a testator, merely because those intentions happen to fall within the prohibition of the Statute of Mortmain."

He had thus stated the rule, because he found in the report of the present case, and in the reports of previous cases, words attributed to the Vice-Chancellor which did not appear to him to express the rule quite accurately.

He now proceeded to consider what was the intention of the testatrix in the present bequest, and what, but for the Statute of Mortmain, would be the mode of giving effect to that intention in this Court.

The will directed that the money should be applied towards the establishment, in the neighbourhood of London and Westminster of slaughter-houses away from the densely-populated places in which they are now situated.

The Vice-Chancellor appeared to have made a distinction between "towards the establishment," and "in the establishment" ; but he could not allow a verbal refinement of such a subtle nature to influence his decision.

The word "establishment" involved the idea of putting the charity on a permanent footing. It pointed to the purchase of sites of land, and the erection of

permanent buildings. And it could not be doubted, that if there were no Statute of Mortmain, a bequest to establish a charity, such as a school, or a hospital, in any parish or district, would be carried into effect by the purchase of land, and the erection of buildings thereon.

The Vice-Chancellor thought that, in this case, the purchase of land, and the erection of buildings, would be the worst plan of carrying the intention of the testatrix into effect; because it was possible that, in a few years, the slaughter-houses, wherever situate, might be surrounded with houses and buildings. But such a consequence did not affect the question of the construction of the words of the bequest. He could not give this bequest a different meaning or effect, because the intention might be defeated by a possible event, at a remote period, which the testatrix did not appear to have foreseen. That might tend to show that the testatrix was not provident, but could not affect the meaning of her words, or justify the Court in substituting a different direction from that contained or involved in the language of the bequest.

It might also be observed, if necessary, that the evil apprehended by his Honour might be easily remedied; for, if it happened that the slaughter-houses became surrounded by dwellings, the site and ground of the buildings would become so valuable that they might be readily sold under the direction of the Courts, and the money applied in the erection of other slaughter-houses in a more removed situation, and so from time to time. His Honour had observed that when the slaughter-houses were erected, there would be no means of compelling the public to use them; but this again was an objection to the prudence of the gift, but could not affect the interpretation of the words. There were many cases on this subject, and some of them were not easily reconciled with others; but he thought there would not have been so much difficulty if the plain rule he had stated had been always adhered to.

He was of opinion that this bequest was wholly void by the operation of the statute 9 Geo. 2, c. 36, and that the amount fell into the residuary bequest.

The order of the Vice-Chancellor must be reversed, but the costs would be paid out of the fund.

Lord Chancellor. { ROGERS v. THE DOCK COM-
15 Nov. 1864. { PANY AT KINGSTON-UPON-
HULL.

*Practice — Appeal — Fresh Evidence — Lands
Clauses Consolidation Act, 1845—Equitable
Lien of Occupier of Lands.*

Although fresh evidence is inadmissible upon the hearing of an appeal, yet fresh exhibits which are capable of being proved by means of a signature, and do not require the examination of witnesses, may be admitted upon proper application being made to the Court.

A took land under an agreement which provided that in case A should erect buildings thereon, he was to have the privilege of removing them during his occupation of the same, or otherwise he was to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of the buildings, such beneficial interest to extend over a period of twenty years; that is to say, if A were required by the landlord to give up possession before the expiration of twenty years, he was to be allowed one-twentieth of the amount expended as aforesaid for each remaining year of the unexpired term of twenty years. A erected buildings on the land. The landlord sold the land to a dock company, and by their direction determined the tenancy at the end of the seventh year, and A having declined to remove the buildings, the company took possession under the 91st section of the Lands Clauses Act, without offering to pay to A the proper proportion of the sums expended by him :—

Held, that A had such an interest in the land as to entitle him to the interference of a Court of Equity in preventing the company from pulling down the buildings till they had provided for his claim.

This was an appeal by the defendants from the decision of Vice-Chancellor Wood, reported 4 N. R. 494, where the facts of the case are fully stated.

Kay (Roll, Q.C., with him), for the plaintiffs, claimed the right to begin (which was conceded to him by the defendants) and also asked leave to introduce new evidence which had only recently come to the knowledge of the plaintiffs, citing,

Roberts v. Marchant, 1 Ph. 371, where it is stated that the only exception to the rule that an appellant is entitled to begin is where the defendant appeals from the whole decree, and the reason assigned for the exception is, that the plaintiff may at the rehearing adduce new evidence, and shape his case differently.

THE LORD CHANCELLOR said that the words "new evidence" in the passage cited meant evidence collected previous to, but not used at, the first hearing. Fresh evidence was entirely inadmissible at the rehearing, and if any such evidence had been discovered subsequently to the original hearing, the plaintiff might file a supplemental bill in the nature of a bill of review: but in order to do so, he must make a proper application to the Court. The present application, therefore, could not be listened to, unless what was now sought to be introduced was not fresh evidence, but simply a fresh exhibit, which was capable of being proved by means of a signature, and did not require the examination of witnesses. The strict rule had been relaxed in the case of such documents.

Kay stated that the document in question was of the class referred to.

Giffard, Q.C., for the defendants, then submitted that the application ought to be made by motion.

THE LORD CHANCELLOR considered that the plaintiff ought to make an affidavit showing the nature of the evidence, and that he had not the means of using it at the hearing, and had used proper diligence in bringing it forward: but suggested that the most convenient course on the present occasion would be to allow the exhibit to be read *de bene esse*, subject to his opinion as to its admissibility.

The counsel for the defendants having consented to the adoption of this course, the document in question was read. It purported to be a receipt by Thomas Hebblethwaite for the sum of 8*l.* 10*s.* for a quarter's rent, due Lady-day, 1857; but there was nothing to show that the rent was paid in respect of the property in question in the suit.

It was thence sought to be established that the plaintiff's tenancy did not commence at Lady-day, but at Michaelmas or Christmas.

THE LORD CHANCELLOR held, that the document was inadmissible, as much more evidence was required than what related to the signature: and observed that even if it were admitted, it did not bear out the contention of the plaintiffs, who might have been let into possession previous to the commencement of the tenancy under the agreement.

Kay then argued—

1st. That it was established that the word "months" in the agreement meant calendar not lunar months, according to the custom of the estate. The plaintiffs had taken the lease on the faith of the usage of the estate, and the defendants ought to be bound by it,

Thornton v. Ramsden, 4 N. R. 208.

The word "month" meant lunar or calendar month, according to the intention of the parties,

Hipwell v. Knight, 1 Y. & C. (Exch.) 401;

Franco v. Alvarez, 3 Atk. 341;

Cockell v. Gray, 3 B. & B. 186;

Barksdale v. Morgan, 4 Mod. 185.

[THE LORD CHANCELLOR asked, in what way this point was open to the plaintiffs, the appeal being by the defendants?]

On an appeal from part of a decree the whole case is open to the respondents,

Watts v. Symes, 1 De G. M. & G. 240.

2nd. That on the true construction of the agreement the plaintiffs had a lien on the buildings for a proportion of the sum expended by them. The plaintiffs were, therefore, now in the position of equitable mortgagees who had been ejected by the mortgagor, and were entitled to the protection of the Court.

Gifford, Q.C., C. Pollock, and Macnaghten for the defendants.

1st. Evidence is admissible to show that Lady-day means Old Lady-day,

Parley v. Wood, 1 Esp. N. P. 193;

Dun & Hall v. Benson, 4 B. & Ald. 589.

It is proved that by the custom of Hull, Lady-day means Old Lady-day: the notice was sent to the plaintiffs two days before Old Michaelmas-day, and was therefore good for next Old Lady-day,

Smith's Landlord and Tenant, 234;

Woodfall's Landlord and Tenant, 298;

Roe d. Durant v. Doe, 6 Bing. 574.

2nd. The true construction of the agreement is, that the plaintiffs have not a lien on the buildings, but a personal demand against the landlord. Even if the plaintiffs have a lien, the company have properly exercised their rights under section 91 of the Lands Clauses Act, and the plaintiffs are not entitled to the assistance of the Court unless it is shown that their security is prejudiced by the pulling down of the buildings: and there is no allegation that such is the case.

[THE LORD CHANCELLOR referred to section 84 of the Lands Clauses Consolidation Act, pointing out that the plaintiffs were occupiers.]

The tenancy was determined long before the company took possession.

[THE LORD CHANCELLOR said, that if the plaintiffs had a lien and were refused compensation by the company, he should not be disposed to hold them to be unlawful occupiers.]

The plaintiffs had not claimed to have a lien till the bill was filed.

Kay, having waived the point as to the sufficiency of the notice, was not called on to reply.

THE LORD CHANCELLOR said, according to the first clause of the agreement, the plaintiffs, during their occupation, had the right of removing any buildings erected by them, even after they had received notice to give up possession. The clause which immediately followed was somewhat obscure; but the agreement ought to be read as if the clause which followed the words "that is to say," &c., were substituted for the preceding clause, and then the meaning was no longer doubtful. It was in the option of the landlord to determine the tenancy: if he did so, and the tenants did not choose to remove the buildings, they would become entitled to demand from him one twentieth part of the amount expended by the tenants for each remaining year of the unexpired term. Now the landlord had determined the tenancy, and, as he must hold, had determined it effectually; the tenants therefore became entitled to make this demand.

The question then arose, whether the agreement availed to give the tenants anything like a lien on the land by way of security, in event of the landlord refusing to pay the stipulated sum after the determination of the tenancy; and he was of opinion, that it was impossible to satisfy the words of the agreement, unless it gave the plaintiffs an interest in the land, sufficient to enable them to obtain their demand in event of the landlord refusing to comply with it. If then

the landlord offered on the determination of the tenancy to pay the stipulated sum, the lien would not arise; if he did not offer to pay it, the lien would arise, and would be enforced by a Court of Equity against the landlord or his assignees, and would avail to prevent the pulling down of the buildings so as to destroy the security.

Now, the Dock Company, who were the assignees of the landlord, knowing all this, had acted on the supposition that the tenant had no interest after the determination of the tenancy. In this they were wrong; for though the tenancy had legally come to an end, the plaintiffs had a species of lien or interest in the land, which stood in the way of the company acting as they had done, until the interest was provided for.

Such being the rights of the parties, the bill was framed on the alternative suppositions, first, that the tenancy was not legally determined; second, that if it were determined, the plaintiffs had still an interest in the land. The company might have closed with the latter proposition, and by offering to provide for the interest of the plaintiffs, have deprived them of their right to the intervention of the Court. He was of opinion, that the word Lady-day in the agreement, was to be interpreted by evidence; that it was shown to mean Old Lady-day, and that the notice having been given two days before Old Michaelmas-day, 1856, was sufficient to determine the tenancy at Old Lady-day, 1857; but, notwithstanding this, the Dock Company had exercised their parliamentary powers in a manner they were not entitled to. The Court, however, would not interfere further than to secure to the plaintiff his interest in the buildings.

Agreeing thus with the Vice-Chancellor on the main question, he was not disposed, under the circumstances of the case, even if allowed by the practice of the Court, to alter the decree as to the costs; and as the plaintiffs had not persisted in their claim as to the tenancy, the petition of appeal must be dismissed with costs.

Lords Justices. } BOUCICAULT v. DELAFIELD.
10 Nov. 1864.

Practice—Costs—Bankrupt.

This was an appeal motion from the judgment of Vice-Chancellor Wood, reported 4 N. R. 476, which decided that a plaintiff who, by becoming a bankrupt, had ceased to be interested in the suit previous to the decree, should not be required to pay costs in the absence of vexatious conduct. It appeared that the only costs in question were the costs incurred subsequent to the bankruptcy of the plaintiff,—viz., the costs of the application of the 2nd of November, 1863, for an order of revival against the assignees, and the costs of attending the Vice-Chancellor to hear judgment, on the 11th of the same month,—see 3 N. R. 33.

Graham Hastings, for the motion, was stopped by the

LORDS JUSTICES, who considered that the application of the 2nd November, 1863, was quite unnecessary, and, expressing a strong opinion against the appeal motion, desired the parties to settle the costs of it out of Court.

Lords Justices. } WARD v. MACKINLAY.
7, 15 Nov. 1864. } *Re* MACKINLAY.

*Administration Suit—Insolvent Estate—
Mortgagee—Sale—Costs.*

A mortgagee came in under an administration suit, in which the general personal estate was deficient, and with his consent an order was made for sale of the property comprised in his security, the produce of the sale to be applied, in the first place, in payment of what should remain due in respect of such security:—

Held, that the insertion into an order, made on subsequent further consideration, of a direction that the costs of the parties of the suit incurred by such sale should be paid in priority to the mortgagee's principal, interest, and costs, was incorrect:

Semble, per TURNER, L.J.: A mortgagee not a party to an administration suit, but who consents to a sale of the mortgaged property in the suit, is entitled to be paid his principal, interest, and costs out of the produce of the sale in priority to the costs of the parties to the suit.

This was an appeal petition from an order of the Master of the Rolls.

The suit of *Ward v. Mackinlay* was instituted against the executrix of the will of George Mackinlay, to administer the testator's estate, which consisted among other things, of a reversionary interest in one-fourth of a sum of 3,444*l.* Reduced Annuities, expectant on the death of the testator's mother, Maria Mackinlay, subject to a mortgage to her for 400*l.* and interest.

The mortgagee was not a party to the suit, but she appeared on further consideration, when the Master of the Rolls, by an order made on the 16th of April, 1857, directed that the estate of the testator should be sold free from Mrs. Mackinlay's mortgage, she, by her counsel, consenting to such sale, and that so much of the money to arise from such sale as should arise from the property comprised in Mrs. Mackinlay's security, should be, in the first place, applied in payment of what should remain due to her in respect of such security: and that the same should, in the meantime, be paid into Court, with liberty to the defendant and Mrs. Mackinlay to bid at the sale.

The testator's general personal estate was insolvent.

Mrs. Mackinlay subsequently purchased the reversionary interest for 530*l.*, which was invested in the purchase of 578*l.* Consols.

On the 1st of June, 1864, there was a sum of 611*l.* due to Mrs. Mackinlay for principal and interest.

By an order made on subsequent further consideration, on the 30th of June following, at which Mrs. Mackinlay appeared by counsel, it was ordered that it should be referred to the Taxing Master to tax the plaintiff and defendant their costs of realising the sale of the reversionary interest in question, and that so much of the sum of 578*l.* Consols as would raise such costs should be sold, and the costs paid, and that the residue of the Bank annuities should be transferred to the mortgagee.

Against this order, so far as it directed that the costs of the sale should be raised out of the sum of 578*l.* Consols, the present appeal was brought.

Hobhouse, Q.C., and *E. G. White*, for the appellant, said, that the point in question had been directly decided in

Hepworth v. Heslop, 3 Hare, 485.

It had been held in some cases, that when a mortgagee had filed a bill for the general administration of the mortgagor's estate, the costs of the suit ought to be paid in priority to the mortgage debt,

Armstrong v. Storer, 14 Beav. 535 ;

Macrae v. Ellerton, 6 W. R. 851 ;

but in the present case the mortgagee had merely obtained leave to bid.

They also referred to

Chissum v. Deves, 5 Russ. 29 ;

Crosse v. General Reversionary Company, 3 De G. M. & G. 698.

Fleming, Q.C., and *Jessel (Selwyn, Q.C.*, with them), for the parties to the suit, argued that when a mortgagee adopted an order for sale made in a suit to which he was not a party, and his security proved to be deficient, he was only entitled to the produce of the sale, minus the costs of it ; for the Court would not give the mortgagee more than he could have got himself ; and if he had foreclosed and sold, he could not have turned the estate into money more cheaply than he had done by adopting the suit,

Dighton v. Withers, 31 Beav. 423 ;

Berry v. Hibblethwaite, 4 K. & J. 80 ;

Tuckley v. Thompson, 1 J. & H. 126 (compromised on appeal, 1 Seton on Decrees, 294, 3rd ed.).

At all events the mortgagee was entitled only to the simple expenses of the actual sale.

Hobhouse, Q.C., in reply.

15 Nov. 1864.

TURNER, L.J., said that the question before the Court did not involve the point, whether a mortgagee, not a party to the suit, coming in and consenting to a sale, was entitled to have his principal, interest, and costs, paid out of the money produced by the sale, in priority to the costs of the sale incurred by the parties to the suit ; for by the order of the Master of the Rolls the money to arise from the sale was to be applied, in the first place, in payment of what should remain due

to the mortgagee in respect of his security. It had been argued for the respondents, that their actual costs of the sale were to be first deducted ; but his Lordship thought that that was not the true construction of the words of the order ; and he did not see how the Court, by the subsequent order, could direct payment contrary to the terms of the first order. On this short ground, he thought the direction for the payment of the costs should be struck out of the order appealed from.

The question before the Court being disposed of, he could only express an opinion on the general question, whether the actual costs of the sale ought to be paid out of the produce of it in priority to the mortgagee's claim. He was not at present satisfied that such costs should be so paid ; for it would be hard that mortgagees, who consented to a sale for the benefit of others, should be saddled with costs. Mortgagees, in cases like the present, usually adopted the suit at the instance of other parties, and they would have rested on their securities if the other parties had not interfered.

The rule of giving the parties to the suit their costs out of the sale money was of modern introduction, and as it was of great importance that mortgagees should, as far as possible, be induced to concur in sales in cases similar to the present, he could not approve of the rule.

KNIGHT BRUCE, L.J., concurred.

Minute.—The decree to be varied by striking out the direction as to costs, and the whole fund to be transferred and paid to the appellant. The appellant to have no costs of the appeal, or in the Court below ; the costs of the respondents of the appeal to be costs in the cause.

Master of the Rolls. } LINFORD v. THE PROVINCIAL HORSE AND
11 Nov. 1864. } CATTLE INSURANCE
COMPANY (Limited).

Agent—Insurance Company—Power to grant Policies.

An agent of an insurance company is not necessarily authorised to contract for the grant of policies.

Semble, whether, after payment of the premium, an insurance company can refuse to grant a policy on returning the premium.

This was a suit to obtain specific performance by the defendants of a contract entered into by their agent, at a branch office, to give a policy of insurance on the plaintiff's cattle. The defendants who carried on the business of cattle insurance, had their head office at Nottingham, and the bill alleged that in July and August, 1863, they had an office in London, at which an agent named Webb transacted business on their behalf, and outside which the name of the company was put up (though incorrectly). On the 23rd

of July, 1863, the plaintiff, attracted by the name outside this office, applied there to insure three cows for 42*l*. He filled up and signed one of the company's printed forms of proposal, which contained the following clause:—"I propose the above stock for insurance, according to the company's rules and conditions, and agree to pay the amount of premium when the policy is presented to me." He paid 10*s*. on account of such premium, and was told that a person on behalf of the company would inspect the cattle.

On the 30th of July, Webb inspected the cows at the plaintiff's premises, and told him that the insurance should be effected; and the plaintiff then paid Webb 25*s*. (making 35*s*. in all), with 2*s*. 6*d*. for stamp duty, and Webb gave him a receipt for 35*s*. on one of the company's printed forms, signed "R. C. Webb, agent." There was a second transaction of exactly the same description. The plaintiff applied to Webb for his policies, but could not get them; and on the 28th of September, 1863, wrote to the company at Nottingham about them. In reply, the plaintiff was informed that he had been cheated by Webb, that no proposal from him had reached the office, that Webb had been dismissed from representing the company, and that the office in London belonged to Webb, and not to the company. A correspondence between the plaintiff's solicitor and the company ensued, in the course of which, the plaintiff claimed the insurance for one of the three cows, which, having fallen ill, had been inspected by Webb, and by his advice sold at a great loss; and the company denied their liability, relying on the words in the form of proposal above stated.

Webb had been dismissed by the company on the 15th of September.

Neither the proposal nor receipt contained any reference to the extent of Webb's powers as agent.

The cause now came on on motion for decree.

Caldecott, for the plaintiff, argued that the company were bound by Webb's acts, as their general agent. A general agent was one employed to do all the acts connected with his principal's business: a third party could not know the exact amount of authority actually given to the agent, and so the principal was bound by the acts of a general agent done within the scope of the general authority, though contrary to the agent's private instructions,

Story on Agency, ss. 17, 126;

Whitehead v. Tuckell, 15 East, 400;

Thorn v. The Commissioners of Her Majesty's Works and Public Buildings, 32 Beav. 490.

Webb was appointed agent to do the general business of the company, and had therefore power to contract to grant policies.

Schwyn, Q.C., and *L. Field*, for the defendants, were not called upon.

THE MASTER OF THE ROLLS said that the plaintiff's case failed entirely. The question was, whether there

was any contract that bound the company. Webb was certainly the agent of the company in all matters in which anyone can ordinarily be the agent of an insurance company. And if he had had authority to enter into policies of insurance without the sanction in each case of the directors of the company, the policies which Webb undertook to grant must now be granted by the company. But to grant policies was not within the scope of the ordinary duties of an agent of an insurance company: to do so was not in the power of an agent at a branch office any more than in the power of the clerk in the head office who received the money for premiums. A debtor who had paid Webb a debt due to the company, might have been discharged; but Webb had no authority to bind the company to grant a policy. The plaintiff had, in the form of proposal, promised to pay the premium on the delivery of the policy: he chose to trust Webb's promise to give him the policy, and paid him the premium beforehand; but the directors might, on Webb's report of the cattle, have disapproved of the insurance and refused to grant the policy. Even if the money had been paid to, and come into the hands of, the directors, they might before issuing the policy have changed their minds and refused to grant the policy. In that case they would have had to repay the premiums paid. As to whether they must do so in this case, he declined to express any opinion. The bill must be dismissed with costs, without prejudice to any action at law which might be brought for the premiums paid.

Note.—See,

Roffler v. The Trafalgar Life Assurance Association, 27 Beav. 377; affirmed by the Lords Justices, 9th July, 1859.

Master of the Rolls. } *SPILLER v. MAUDE.*
11 Nov. 1864.

*Friendly Society—Sole Survivor—Charity—
Right to the Fund.*

A sole survivor of a society in the nature of a friendly society is not entitled to the principal of the fund belonging to the society and which arose from the contributions of members.

Quere, How should this fund be dealt with?

Semble, where a portion of the funds of such a society arises from donations by persons who are not members of the society, that portion is to be treated as a fund devoted to charity, and to be applied cy-près.

On the 22nd of July, 1815, a fund called the "York Theatrical Fund," for the benefit of old and infirm actors, was instituted at the Theatre Royal in the City of York by twenty-eight members of the York company of actors and actresses, including the plaintiff, and rules for the regulation of the fund and society were drawn up and adopted by the subscribers.

The society was not then registered under the Friendly Societies Acts, but in 1832 the rules were amended by a general meeting, and were certified by the Registrar of Friendly Societies, and confirmed by the justices in accordance with 10 Geo. 4, c. 56. By these rules the fund was vested in three trustees, but was managed by a committee of five, appointed at the annual general meeting of the society, and by a treasurer and secretary. Members were to be elected by the committee, those candidates only being qualified who had been for one year actual performers on the stage in the York company. The funds of the society were to be raised by fixed contributions from members, forfeits in the theatre, and annual benefits. The treasurer was also to collect moneys from the voluntary contributions of persons who were not members of the society. Members who were in arrear were to be excluded from all property and benefit from the fund. Members who had subscribed for seven years were entitled when incapacitated to have an annuity, which, with any independent income which they might possess, would make up the sum of 50*l.* per annum. The committee also had a discretionary power of providing medicines and advice for sick members in indigent circumstances, and of relieving orphan children of members, and of contributing towards the funeral expenses of poor members. The capital was not to be broken into, and if the interest was insufficient, the annuities were to be proportionally reduced. No provision was made for the dissolution or extinction of the society, or for the application of the funds in either of those events. The three trustees had made a declaration of trust in favour of the society in 1825. In 1835 a new trustee was appointed in the place of one deceased. He survived his co-trustees, and the defendants were his executors.

In 1835 there were only six members of the society, and a proposal was made to divide the funds among them, but it was not carried out, owing to the trustees refusing to act without the sanction of the Court. At that time the fund consisted of 1300*l.* New Three-and-a-half per Cent. Annuities; and since then no subscriptions had been made to the fund, and no new members had been admitted. Five of these six members were since dead, and the plaintiff was now the sole survivor of the society, and the only person entitled to any beneficial interest in the fund. She had duly subscribed for seven years, and was otherwise qualified under the rules to receive, and had been for some time receiving, an annuity, and had received since 1862 the whole of the income of the fund. A claim had been made in 1864, by a child of a deceased member, who was shown not to be in needy circumstances; and the plaintiff proved that there were no orphan children who could now make any claim. No accounts of any sort could be found, except an old play-bill, on the back of which was a list of donations (amounting to nearly 300*l.*) by various persons, not members of the society. This play-bill also contained

an appeal for support from the public, and a statement that the capital of the fund was never to be broken into, and that the society was to be managed in the same way as similar societies in the London theatres. The plaintiff claimed to be entitled to the principal of the fund, but the defendants had declined to transfer it to her, except under the direction of the Court. She, therefore, instituted this suit, seeking to enforce her rights. The cause now came on, on motion for decree.

A. G. Marten, for the plaintiff, argued, if this was an ordinary friendly society, the fund belonged to the members for the time being. The members were entitled to the fund as joint tenants, as is presumed where the law merchant does not apply, and on a person ceasing to be a member, his interest in the fund ceased also, as in any other club. In 1835 the members proposed to divide the fund, showing what they thought of their rights. The Friendly Societies' Acts provided for the appropriation or division of the funds on dissolution by a certain proportion of the existing members,

10 Geo. 4, c. 56, s. 26;

13 & 14 Vict. c. 115, s. 34;

18 & 19 Vict. c. 63, s. 13.

He also contended, in opposition to an objection taken by the defendants in their answer, that the Attorney-General was not a necessary party. This was a private society, not a public charity: and donations from the public did not make it a public charity, or anything but an ordinary friendly society,

Anon. 3 Atk. 277.

At least the fund should be brought into Court.

C. Hall, for the defendants, the trustees, submitted whether, as the funds arose partly from subscriptions of the public, the Attorney-General should not be a party in dealing with the capital. The defendants wished to act as the Court directed, and did not object to bring the fund into Court.

THE MASTER OF THE ROLLS, without calling for a reply, said that he could not order the payment of the fund to the plaintiff. It was clear that nearly 300*l.* of the fund arose from contributions from persons who were not members of the society, and these contributions must have been made with a charitable view, and for the general purpose of supporting the fund as a charitable object. They ought therefore to be applied *cy-près* to charitable purposes, if it could be discovered what proportion of the fund arose from such donations. It was doubtful whether, if anyone were entitled to the fund, the executors of the deceased members were not entitled to share. The fund might be brought into Court, and the interest paid to the plaintiff during her lifetime, with liberty to apply at her death, in which case notice should be given to the Attorney-General. If she were entitled to any part of the fund, she might dispose of it by will. The costs of all parties to be paid out of the fund.

Kindersley, V.-C. } **TURNER v. SOWDEN.**
10 Nov. 1864.

Practice—Infant—Guardian ad litem—Notice of Application—Non-service—Cons. Ord. VII. r. 3.

At the hearing of an application for the appointment of a guardian ad litem to an infant defendant residing in America, the Court dispensed with the service of the notice of such application, as required by the Cons. Ord. VII. r. 3.

This was an application, under the Cons. Ord. VII. r. 3, for the appointment of a guardian *ad litem* to an infant defendant resident in America. He had been duly served with a copy of the bill in this suit, as provided by the statute 15 & 16 Vict. c. 86; but no notice of the present application had been served,—see the Cons. Ord. VII. r. 3.

C. Chapman Barber now moved for the appointment of a guardian *ad litem* to the infant defendant, and to dispense with service of notice of the present application. A similar dispensation had been granted in the suit of

Lambert v. Turner, 31 L. J. Ch. (N. S.) 494, and in respect of the same defendant.

The words “last-mentioned service” in the proviso to the Order referred generally to the service of the notice of the proposed application, and were not confined to the case of an infant not residing with his father or guardian.

KINDERSLEY, V.-C., was of opinion that the words “last-mentioned service” applied generally to the service of the notice: and said he should, under the particular circumstances of the case, dispense with service of the notice, and make an order for the appointment of a guardian *ad litem*.

Stuart, V.-C. } **GATES v. BUCKLAND.**
10 Nov. 1864.

Practice—Informal Jurat—Superfluous Signature.

Affidavit ordered to be received, notwithstanding that the jurat was informal.

Bristowe applied for an order that an affidavit should be received and filed, which the officer of the Court had refused.

The affidavit had been sworn before a notary in Chicago, and it was objected that the jurat appended to the affidavit below the signatures, instead of certifying in the usual form, that the deponent, by name, appeared personally before the notary and swore it, merely ran thus:—“Sworn to, and subscribed before me, A. B., Notary Public.”

STUART, V.-C., said it was evident that the meaning of the jurat was, that the subscribers of the affidavit had sworn to it before the notary; and as the signatures identified the subscribers, the jurat was sufficient. He ordered the affidavit to be filed.

Stuart, V.-C. } **Re CLARK'S ESTATE.**
11 Nov. 1864.

Practice—Married Woman—Consent in Court.

A small fund, the produce of a married woman's real estate, paid out of Court without her appearance and consent.

In this case a married woman had been entitled in fee to a small share of real estate which had been taken by a railway company. Her share of the purchase-money did not exceed 30*l.*; and she and her husband, and a mortgagee in whose favour the husband and wife had agreed to charge the share, now petitioned that it might be paid out of Court to the mortgagee without a deed acknowledged and without the examination of the wife in Court.

Bury, for the petitioners.

Martineau, for other parties.

STUART, V.-C., made the order asked for.

Note.—See

In re Hayes, 9 W. R. 769.

Stuart, V.-C. } **HEATH v. LEWIS.**
11 Nov. 1864.

Married Woman—Equity to a Settlement—Divorce.

A fund in Court stood to the account of husband and wife, and the wife was declared entitled to a settlement out of it; but no settlement was actually decreed. After the order the wife was divorced abroad:—

Held, that she was entitled to the whole fund.

A share of a fund in Court had been carried over to the account of Mr. and Mrs. Johnson, then residing at the Cape.

In 1856 Mr. Johnson came to England; and by virtue of a power of attorney, executed by his wife, borrowed 100*l.* from Scales, on the security of the fund. He then petitioned for the payment of Scales out of the fund in Court, a settlement of half the residue, and payment of the other half to himself.

Mrs. Johnson, by her next friend, asked for a settlement of the whole fund.

In 1858 the Court made an order, declaring Mrs. Johnson's right to a settlement of the whole or some part of the fund; but the matter stood over for additional evidence as to the amount to be settled; and in the meantime the dividends were ordered to be paid to Mrs. Johnson for her separate use.

Subsequently, Mr. Johnson became insolvent, returned to the Cape, and there obtained a divorce *a vinculo*.

Mrs. Johnson now asked, by petition, for a settlement of the whole fund. The children of her marriage had not been served.

Green, Q.C., and Caldecott, for the petitioner, cited *Wells v. Malbon*, 31 Beav. 48.

Freeling, for Scales, the mortgagee.

In 1856 the domicil of Mr. and Mrs. Johnson was colonial, and by the Roman-Dutch law of the Cape Mrs. Johnson's interest in the fund was bound by the mortgage. If their domicil was not colonial the divorce was invalid, and the wife cannot take the fund.

Osborne, Q.C., for Stansfeld, the assignee in insolvency.

The fund had been reduced into possession by the husband. It was his, subject to the right of the Court to settle it; and, that scheme being abandoned, the husband's right revives. In *Wells v. Malbon*, the property was reversionary; and therefore the divorce produced the same effect as the death of the husband.

STUART, V.-C., said that the fund belonged to Mrs. Johnson, subject to the marital right of her husband, and that right being now gone, the fund was hers absolutely. She was a *feme sole*, and there had been no reduction into possession. Nothing but a settlement, or a decree for one, could enable the children to assert any claim, and there was no necessity to serve them with the petition. *Wells v. Malbon* was not in point. The mortgage was made in England, and described Mr. Johnson as "now of Bishopgate Street;" and there was no evidence of a colonial domicil. He must assume that the Colonial Court had jurisdiction to decree the divorce.

STUART, V.-C. } THE STAFFORDSHIRE AND WOR-
12, 14 Nov. 1864. } CESTERSHIRE CANAL COMPANY
v. THE BIRMINGHAM CANAL
COMPANY.

*Injunction—Canal Company—Supply of Water
—Prescription—Parliamentary Contract.*

The defendants' canal communicated, under authority of their Act, with the plaintiffs' canal; and the defendants had for more than seventy years allowed the water from their locks to flow, along with the boats, into the plaintiffs' canal:—

Held, that the plaintiffs had a right to the continued supply of water.

This was a motion for an injunction (turned by consent into a motion for decree) to restrain the defendants from preventing the water of their canal from flowing through their locks into the plaintiffs' canal.

The Birmingham Canal Company's Act (8 Geo. 3, c. 38) empowered that company to make a communication from the summit of their canal at Wolverhampton, down a descent of 182 feet, to the summit of the plaintiffs' canal at Atherley.

The Act gave the plaintiffs power, on the default of the Birmingham Company, to step in and make the communication at the Birmingham Company's expense (section 87); and it contained regulations to prevent boatmen from wasting water in using locks (section 67).

In 1770 the junction canal had not been made; and the plaintiffs, doubting whether their power to intervene had arisen, and requiring powers to raise capital and take lands, applied to Parliament for a new Act, to enable them to effect the communication: but the two companies came to terms, and appointed a joint committee, in which the plaintiffs had a majority of votes, to carry out the works at the Birmingham Company's expense. The canal was accordingly cut by this committee, with twenty locks. Another lock was added in 1791—whether by agreement or not did not appear; and since that time the plaintiffs' canal had received from the lowest lock, on the passage of every boat, at least seven feet of water.

Meanwhile, the Birmingham Canal Company and several other companies were consolidated, in 1835, by the 5 & 6 Will. 4, c. xxxiv., with the defendants' company. This Act gave the defendants many powers which were not given by the Birmingham Company's Act, but were adopted from the Acts of some of the other consolidated companies. Amongst these were powers to raise water from one level of their system to another level (section 15), and to make double or parallel locks (section 29); but it gave the plaintiffs damages, assessable by a jury, if the water in the Wolverhampton level should be allowed to sink below 3 feet (section 83); and it contained a general saving clause of the plaintiffs' rights, providing that nothing in the Act contained should authorise the defendants to affect any of the "springs, brooks, streams, feeders, waters, or watercourses" lawfully used for the purposes of the plaintiffs' navigation, or to vary their own canals so as to impede the plaintiffs' navigation (section 258).

In 1862, the defendants, finding themselves short of water, proposed to erect machinery for pumping back their water from the lowest lock but one up to the Wolverhampton level, so as to use it over and over again in carrying their boats down the chain of locks. By this arrangement the plaintiffs would only receive 2 feet of water with each boat; and this attempt to reduce the plaintiffs' customary supply of water led to the present suit.

The Attorney-General, Q.C., Craig, Q.C., and Jolliffe, for the plaintiffs.

1st. The Birmingham Canal Company's Act was a

Parliamentary contract between the two companies. We have an interest in its arrangements, which involve, in their very nature, a supply of water to our canal. We were to receive a supply of water corresponding to the loss occasioned by the forwarding of their boats down our canal. Even if this were not so, the agreement of 1771 gave us, practically, a right to make the junction canal as we pleased; and we have a right to have it kept up as it was made. Our acquiescence in the making of the additional lock, if it were proved, would not bind us to submit to this new injury.

2nd. The defendants' Acts expressly provide for our interests, by regulating the passage of the water, and protecting the Wolverhampton level for our benefit.

3rd. We have had the enjoyment of this flow of water for more than seventy years,

Magor v. Chadwick, 11 Ad. & E. 571, 581, 582;

Arkwright v. Gell, 5 M. & W. 203;

Broadbent v. Ramsbotham, 11 Exch. 602;

The Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

Bacon, Q. C., and *E. E. Kay*, for the defendants.

1st. Neither the Acts of Parliament nor the agreement say one word about supplying the plaintiffs with water. Our duty was to make a communication, and it would have been satisfied by any mode of communication which left water enough in the last lock to float the barges into the plaintiffs' canal. We had no power to take water, except for the purposes of our Act; and beyond those purposes we could not agree to give it away. It is impossible that the agreement could be intended to give the plaintiffs that absolute control of our undertaking which they claim.

2nd. The express provisions of our Acts are in our favour. The regulations imposed on our boatmen have nothing to do with the plaintiffs: they apply to all the locks on our system. The saving clause only prohibits us from interfering, under our general powers, with the springs and brooks from which the plaintiffs derive their water. A canal is not a watercourse, but a pond. Besides, it is our express right and duty to pump up water and take all other necessary measures for the improvement of our navigation.

3rd. The prescription claimed rests upon a grant which we had no power to make,

Rochdale Canal Company v. Radcliffe, 18 Q. B. 287.

No right is acquired by such an intermittent and temporary use as this,

Wood v. Ward, 3 Exch. 748;

Greatrex v. Hayward, 8 Exch. 291;

Rawstron v. Taylor, 11 Exch. 369;

Gale on Easements, 263 (3rd ed.);

Ellwell v. Birmingham Canal Company, 3 H. of L. Ca. 812,

which is precisely like this case.

Magor v. Chadwick does not apply, for three reasons:—

1st. It was a dispute, not between the author and the enjoyer of the supply, but between the enjoyer and the owner of intermediate property.

2nd. It was a case of fouling. To send down foul water instead of clean water is to impose a new servitude.

3rd. The observations of Patteson, J., which plaintiffs rely on, are not judicial dicta, but argumentative.

STUART, V.-C., delivered judgment without calling for a reply.—This was a question between two public companies. It was of the essence of their authority that there should be a communication between their canals, and the levels were such that it must be by locks, and by the ordinary action of the locks the plaintiffs had received a supply of water for more than seventy years. The ordinary considerations which governed the right to a supply of water from an artificial watercourse had no application in a case where the rights of both parties stood equally upon a legislative contract between themselves and with the public. A communication was enacted, and under the communication adopted the plaintiffs enjoyed a flow,—intermittent, no doubt, but still a flow. There was no need to resort to the presumption of a grant, and therefore the power of the defendants to grant was not in question. The grant was made when a communication was enacted, under circumstances which made it impossible but that some water should be given. The defendants said that they were not and never had been bound to afford any supply, but that they had done so, and the plaintiffs had enjoyed it for seventy years for a public purpose. The cases cited were all explicable, under their own circumstances, and the ground of the decision of the case in the House of Lords supported his Honour's view. The Court found in that case that there was no surplus water, and neither grant, contract, nor usage could be found to support the right claimed. He must grant a perpetual injunction.

COMMON LAW.

Q. B. } JEPSON v. BELL.
5 Nov. 1864.

Liability of Assignee for Benefit of Creditors for Goods supplied to the Estate before Assignment.

A and B carried on business together under the name or firm of A, B, & Co. The father of A and B managed the business, and the orders were given by him in the name of the firm, of which he was not a member. A and B assigned to him for the benefit of creditors. A creditor, unaware of the assignment, sued the father for goods supplied for the business. The assignment was not put in evidence. The jury found that the credit was given to A and B:—

Held, that in the absence of legal evidence of the assignment to show the nature and terms of the interest given to the trustee, there was no ground for disturbing the finding of the jury.

The action was for 86*l.* for goods supplied to a druggist who carried on business at Leeds under the name or firm of James Bell & Co. The business was conducted by two brothers of that name, but the orders had been given by their father, who managed the business, in the name of the firm. They made an assignment to the father for the benefit of creditors; the deed was not, however, put in evidence at the trial, so that there was no legal evidence of the terms of the assignment, and the question at the trial was raised, to whom was credit given,—to the sons or to the father? At the time the goods were supplied the plaintiff did not know of the change in the business, nor of the assignment, and stated in his evidence at the trial that he gave credit to the father and not to the sons. The orders were in the name or firm of James Bell & Co., and the father, whose name was Thomas Bell, had never been a member of that firm. The plaintiff applied to the father, the trustee under the assignment, for payment, who said he did not know what funds there would be for the creditors. He then brought his action against the father, thinking it useless to sue the sons. The case was tried at the last assizes at Leeds, before Mr. Justice Blackburn, who left to the jury the question, to whose credit were the goods supplied? The jury found that credit was given to the sons, and there was a verdict for the defendant.

Cleasby, Q.C., now moved, on the part of the plaintiff, for a new trial, on the ground of misdirection, and that the verdict was against the evidence.

The father was the person liable to pay, for the property had passed to him under the assignment; and

although, at the time the goods were supplied, the plaintiff was not aware of the fact, yet when it was brought to his knowledge he had a right to elect to render the father liable, as in the case of an undisclosed principal. The father was not the agent, but the real and true principal in the transaction, having the legal right to the property and profits of the business, though he held under an assignment.

COCKBURN, C.J.—I think there should be no rule in this case. I do not mean to lay it down that in every case where persons have been carrying on business in the name of a firm, and the business is transferred to another person, and goods are supplied in the name of the firm by a tradesman who is unaware of the transfer, that he cannot sue the transferee of the business, and who is the person by whom the goods have been used. But that was not quite the case here; for, assuming the fact of an assignment, it was a bare trust, and it would be too strong to say that, although the goods were supplied on the credit of the members of the firm, the trustee was to be liable. To raise this point, there should have been legal evidence of the assignment, to give the jury means to form an idea what interest the assignee took, and to see its nature and terms. But when the goods were supplied, the plaintiff did not know of the assignment. I see no reason to disturb the verdict on the evidence, and there was no misdirection.

CROMPTON, J.—I concur with the Lord Chief Justice. As to the evidence, it is well known that in cases of this kind, in questions between father and sons, juries are disposed to lean against the party sued, so that in this case they must have been satisfied of the non-liability of the defendant. As to the point of law, the Judge could not have directed the jury to find against the defendant in the absence of legal evidence of the assignment. But the jury found that in point of fact the credit was given to the sons, and that was the real question in the case.

MELLOR, J., concurred.

Rule refused.

Q. B. } THE MIDLAND RAILWAY COMPANY,
9 Nov. 1864. } Appellants, v. THE OVERSEERS OF
THE POOR OF THE PARISH OF
BADGOWORTH, Respondents.

Poor-rate — Railway — Occupation — Running Powers—Parliamentary Easement.

By Act of Parliament a railway between G. and C.

was divided into halves, the half nearest to G. belonging to the M. Railway Co., the half nearest to C. to the G. W. Railway Co. The whole was of a mixed gauge, one line of rails being used by the M. R. Co. alone, one by the G. W. R. Co. alone, and one commonly by both. Each company gave to the other, without payment of toll, the right of running and making profits over the half belonging to itself, but each paid exclusively for the maintenance of its own half.

The profits made by the M. R. Co. far exceeded those made by the G. W. R. Co. Part of that half of the railway nearest to C. was in the parish of B :—

Held, that the M. R. Co. were not liable to be rated to the poor of the parish of B. in respect of the part of the railway in that parish, having only running powers in the nature of a parliamentary easement and no beneficial occupation :

Held, further, that the G. W. R. Co. were liable to be rated as occupiers to the parish of B. in respect of such part :

Semble, that such rate might be made on the full profits made by the M. R. Co., that being the mode of ascertaining the value of the G. W. R. Co.'s occupation.

This was a special case, stated by consent of the parties and by order of Crompton, J., made June 5, 1862, under the statute 12 & 13 Vict. c. 45, s. 11, to raise the question, whether the appellants were liable to be rated to the relief of the poor in the respondent parish in respect of part of a certain line of railway under the following circumstances :—

The railway in question extends from Cheltenham to Gloucester, and passes through the parish of Badgworth. Its formation was originally intended to be regulated under the provisions of the Local Act, 6 & 7 Will. 4, c. lxxvii., by an arrangement between the Cheltenham and Great Western Union Railway Company and the Birmingham and Gloucester Railway Company. The former of these two companies was afterwards, by Act of Parliament, amalgamated with the Great Western Railway Company, and the latter with the Midland Railway Company; and the original scheme was in the main carried out between the Great Western Railway Company and the Midland Railway Company. The arrangement was as follows :—

The whole line was made by the Midland Railway Company; but on payment by the Great Western Railway Company to the Midland Railway Company of half the money expended by them in making the railway, the Midland Railway Company became trustees only for the Great Western Railway Company of that half of the railway lying nearest to Cheltenham, and of that part the Great Western Railway Company had the direction and control, and paid for all the repairs thereon, but allowed the Midland Railway Company to run over it and to make their own profits in respect of it. Similar powers were given by the Midland Railway Company to the Great Western Railway Company with respect to that half of the line lying

nearest to Gloucester, which belonged to them (the Midland).

The line was opened in 1847 with a mixed gauge, consisting of three lines of rails, one of which was used by the Great Western Railway Company alone, one by the Midland Railway Company alone, and one was used in common by both. The part of the line which passes through Badgworth is in that half lying nearest Cheltenham. The Midland Railway Company had exclusively paid all the expenses of the half nearest Gloucester, and the Great Western Railway Company those of the half nearest Cheltenham; but the traffic of the Midland Railway Company was far greater than that of the Great Western Railway Company, and therefore their profits much larger.

An action having been brought by the Great Western Railway Company against the Midland Railway Company for tolls on that part of the railway nearest Cheltenham, the Court of Queen's Bench held that the Great Western Railway Company had no right to the tolls, and the Exchequer Chamber and (since the case was stated) the House of Lords had confirmed that decision.

Both companies were rated to the parish of Badgworth in 1861.

The question for the opinion of the Court was, whether, under these circumstances, the appellants were liable to be rated to the respondent parish.

Dowdencoll (Stavelcy Hill with him), for the respondent parish, argued that there was a beneficial occupation by the Midland Railway Company.

He was at first stopped.

Crompton Hutton, for the appellants.

The Midland Railway Company have no occupation and receive no toll.

[COCKBURN, C.J.—They make profits.]

Only as an omnibus does on a highway. Each company has an absolute right of running over the half of the line belonging to the other company.

[CROMPTON, J.—There is profit made by the traffic on the whole of this line. Are the Great Western Railway Company to pay for the whole, or is the parish to lose half?]

Neither company pays toll to the other, but each gives an equivalent by allowing the other company to run over its line. This parish is on the Cheltenham half, that is the half belonging to the Great Western Railway Company. The Act says each company shall have lines on its own half for both companies, and that the Cheltenham half shall belong to the Great Western Railway Company.

[COCKBURN, C.J.—Yes; but that does not show the occupation.]

The Great Western Railway Company are tenants in fee simple of this half, and then they lay down lines and have the sole control of it.

[COCKBURN, C.J.—Except keeping off the Midland.]

Yes. But what occupation have the Midland? No more than an omnibus company has of the lands over which it makes profits. The Midland have only a parliamentary easement over this half.

[SHEP, J.—But the Midland get great profits on this half, and the Great Western none.]

[COCKBURN, C.J.—You say the Great Western do get an equivalent?]

Yea.—He was then stopped.

Dowdeswell again for the respondents.

The Great Western have not a corresponding benefit.

[CROMPTON, J.—That is because a bad parliamentary bargain has been made for them.]

[COCKBURN, C.J.—What is this but a running power?]

It is a substantial occupation. No toll is paid. Here there is practically a joint occupation. I admit there is a division of the legal property, and that the one company is trustee for the other. But this is not really an easement. If the decision is against the parish, the rateable value of this half will not be got at all.

[COCKBURN, C.J.—Yes, it will. The Great Western will have to pay on the rateable value of this half; and that value will be ascertained by seeing what profits are made upon it, not only by themselves, but also by the Midland.]

Is not this really an occupation under the Act?

[COCKBURN, C.J.—How does this differ from the case of a person having a right of way over a road?]

In degree,

R. v. Bell, 7 T. R. 598.

Exclusive occupation is not necessary for purposes of rating. There may be an occupation on alternate days. With regard to the third line of rails, there is practically a real enjoyment.

Crompton Hutton, for the appellants, was not again called upon.

COCKBURN, C.J.—When the facts are apprehended this is a clear case. The whole question is, whether of that part of the line in which the fee simple is in the Great Western Railway Company the Midland Railway Company are occupiers. It is admitted that the railway between Cheltenham and Gloucester is divided between the two companies as far as the property in the soil and rails is concerned; and that the fee simple of that half of the line which includes the part on which the assessment in question was made, is in the Great Western Railway Company. Why then are not the Great Western Railway Company occupiers of it? The Midland Railway Company, it is true, exercise over this half of the line the right of bringing their carriages over it. But this is like the common case of running powers, the only difference here being that the arrangement is made by virtue of parliamentary enactments, which do not give such running powers in terms. In effect the Act says that the proprietorship of one half of the

line is to be in one company, the other half belonging to the other company; and each company is to have the right of running over that part of the soil occupied by the other. The enactments are somewhat complicated, but the meaning is as clear as in the case of ordinary agreements. How can this be made into more than an easement? Mr. Dowdeswell says there is more running over this part of the line by the Midland Railway Company than by the Great Western Railway Company. But this makes no difference. This is only an easement, and therefore not such an occupation as can be rated. But then Mr. Dowdeswell says, if the Midland Railway Company are not rateable for this portion of the line, neither are the Great Western Railway Company rateable in respect of the profits derived by the Midland Railway Company on this portion of the line; and, if so, the parish will get no rates on such profits from either company. But the Great Western Railway Company are rateable as occupiers for this portion of the line, and, if so, at what value? At the value of that portion to be ascertained by the profits made upon it. The Great Western Railway Company have agreed to give up these profits themselves for an equivalent advantage given to them in the shape of similar running powers over that half of the line occupied by the Midland Railway Company. It must be assumed that the Great Western Railway Company for a valuable consideration have given up their profits. I think this is only an easement and not an occupation, and, therefore, that our judgment should be for the appellants.

CROMPTON, J.—I am of the same opinion. At first I did not know that there had been a division of the line, by which each company had a right of running over the half belonging to the other. Now that I see the real nature of the bargain, I think that this is rather the case of an easement or of running powers than the case of an occupation. As to the difficulty of the parish getting the proper amount of the rate from the real occupier, rent is not the only criterion of the value. You must get at the value as well as you can. The question here is, who is the occupier of the land? Is it a split occupation, or that of one company with an easement to the other? I think this is the common case of running powers being given to the Midland Railway Company, not an interest in the soil. As to the rail which was used in common, it would be difficult to say that the Great Western Railway Company have no occupation. As to the rail used only by the Midland Railway Company, its exclusive occupation by them (the Midland) is not established. Again, the persons who were to repair the railway are the Great Western Railway Company. To say that one rail by itself is occupied by the Midland Railway Company would be absurd; for the Great Western Railway Company might at any time use the other rail. So that there is nothing like exclusive possession in the soil on the part of the Midland Railway Company. The

House of Lords has lately confirmed the decision of the Exchequer Chamber and this Court in the case mentioned in this special case, that each of these companies has the benefit of the other's railway. It does not matter whether this benefit is paid for by tolls or by other means of profit. The value must be ascertained as well as we can. The question of occupation and the question of value should be kept separate.

MELLOR, J.—I am of the same opinion. The only difficulty is as to the nature of the consideration. At first I thought the parish might thus be a great sufferer, and only get the value of the occupation by the Great Western Railway Company, and so lose what they ought to have. But instead of tolls, the Great Western Railway Company get, in exchange for the running powers which they give to the Midland Railway Company, 'similar powers for themselves over the other half of the line. There is a difficulty in ascertaining the value at which the land should be rated; but it must be got at in the usual way. It will be the value of the occupation, *plus* the profits made by the Midland Railway Company.

SHEE, J.—In order to show that the Midland Railway Company are rateable for that part of the half of the railway belonging to the Great Western Railway Company which is in the parish of Badgworth, it is not sufficient to show that they (the Midland) receive profits from a right of way over such part, but it must be shown that they get profit from that part of which they are in occupation. It is clearly laid down in the cases, that an easement is not rateable. But it is said, if we decide for the appellants, part of the profits in the parish of Badgworth will not be rateable at all. This does not follow. It has often been laid down that, for the purposes of rating, the value of the portion of a line in a parish is to be ascertained by the rent which might reasonably be expected for it from a tenant from year to year. But even if Mr. Dowdell could show us that the Great Western Railway Company are not liable to be rated to the full value of the profits on this portion of the line, they will get the benefit of that. But this does not show that the Great Western Railway Company are not occupiers. If the Great Western Railway Company do not get their profits, it is because by a bargain they have got rid of them.

Judgment for the appellants.

Q. B. { HALL DARE, Appellant v. THE
9 Nov. 1864. { CHURCHWARDENS AND OVER-
SEERS OF THE POOR OF THE
PARISH OF WENNINGTON, Re-
spondents.

Poor-rate—Deductions from Gross Rateable Value—Sewers Taxes—Parochial Assessment Act, 6 & 7 Will. 4, c. 96, s. 1.

In estimating the net annual value of hereditaments

for assessment to the Poor-rate under 6 & 7 Will. 4, c. 96, s. 1, deductions ought to be made in respect of sewers taxes and other charges on the property imposed by a District Commission of Sewers, under 23 Hen. 8, c. 5, and other Acts in that behalf, and paid by the occupier.

This was an appeal against a poor-rate. The Sessions by consent of the parties confirmed the rate subject to a case, which was to the following effect:

The appellant was the owner and occupier of a house and about 480 acres of land, in the respondents' parish, of which about 400 acres were within the limits of the level of Wennington. The parish contained about 1270 acres, of which about 860 were within the level. The said level was within the jurisdiction of the Rainham Commissioners of Sewers, under the statute 23 Hen. 8, c. 5, and the other Acts as to sewers and sea embankments. The said 400 acres of the appellant were duly taxed at 50*l.* annually by the said Commissioners for the general sewers tax, under 4 & 5 Vict. c. 45, and the appellant had duly paid the same. He was also taxed by virtue of the statutes in that behalf, by the said Commissioners, at 15*l.* on an average, yearly, for the maintenance and cleansing of the sewers and works in the said level, from which his said lands in the said level received benefit and avoided damage. This sum also he had duly paid. There were also within the said Commissioners' jurisdiction, and within the said level, and on the said lands of the appellant, a sluice and floodgate, by which the said lands of the appellant only were benefited, and which were repaired and cleansed under the superintendence of the marsh bailiff, at an average expense of 60*l.* a year, which had also been paid by the appellant. Lastly, the lands in the said level abutted on the river Thames, and were protected from inundation by a sea-wall, and in accordance with a presentment made at a court of the said Commissioners, as to the immemorial liability of the owners of the said lands to pay for the repairs of this sea-wall proportionately, the appellant had to pay an average sum of 40*l.* yearly, for his proportion of such repairs. The appellant had been rated without any deduction having been made from the gross rateable value of his aforesaid property in respect either—

1st. Of the General Sewers Tax.

2nd. Of the yearly tax for the maintenance and cleansing of the sewers and works in the said level from which his said lands in the said level received benefit.

3rd. Of the annual expense of maintaining the sluice and floodgate by which the lands of the appellant only were benefited.

4th. Of the annual payment for repairing the sea-wall.

The question for this Court was, whether the appellant was entitled to claim deductions in respect of any or either, and which of the said sums.

Lush, Q.C., Murphy, and Horace Davey, for the respondents.

The General Sewers Tax is not a tenant's tax within the meaning of the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, s. 1, but a rate payable by the landlord.

Palmer v. Earith, 14 M. & W. 428.

These are all landlord's taxes. None of these deductions should be made,

Regina v. Inhabitants of Vange, 3 Q. B. 242.

The expenses of maintaining the premises only are to be deducted. The sea-wall is not part of the premises. The floodgate was not for the maintenance of the premises. The statute is only regarding the payments by a tenant *quid* tenant. They also cited,

Baker v. Greenhill and Others, 3 Q. B. 148.

Mellish, Q.C., and Philbrick, for the appellant.

The expenses to be deducted are not only those which are paid by the tenant. *Regina v. Vange*, is distinguishable from this case,

Regina v. Adames, 4 B. & Ad. 61.

Sewers-rate is a tenant's tax. *Palmer v. Earith* only shows it is not a parliamentary tax,

Com. Dig. tit. Sewers, E.

All the taxes in this case are for keeping up annually the necessary works, and are therefore payable by the tenant.

COCKBURN, C.J.—I am of opinion that our judgment should be for the appellant. The question is, whether, in assessing this property and ascertaining its rateable value, deductions should be made for rates and taxes to which the lands are subjected for district sewage. I think the case may be put two ways in favour of the appellant. By the Parochial Assessment Act the nett annual value of the property is to be ascertained by a calculation of the rent which might reasonably be expected from an imaginary tenant from year to year, after deducting the tenant's rates and taxes. First, then, I think these sewers-rates imposed by the Commission of Sewers are tenant's taxes. But, secondly, suppose them not to be tenant's taxes, and therefore not to be deducted under the first part of section 1 of the Parochial Assessment Act; they are still subject to deduction, as the statute goes on to provide that certain other deductions should be made for insurance, repairs, and other expenses necessary to maintain the premises in a state to command the rent. As to expenses not incurred by the proprietor himself, but imposed on him against his will for distant sewage, I think these might not come within the Act. I think these are tenant's taxes. By the statute of Henry VIII. the Commissioners of Sewers are entitled to assess each person according to the nature of his interest and his estate, and the profit which he derives. What would be the position of the imaginary tenant from year to year under the Parochial Assessment Act? According to the quantity of his interest he is liable to be assessed to the tax. There is nothing in the Act by

way of declaration or inference, that a reversioner should be liable to reimburse the tenant from year to year what he has expended for these disbursements. Suppose a general tax to be imposed. The Commissioners would then have to distinguish between the interests of the tenant and the reversioner and apportion it between them. If so, it is a tax which a tenant from year to year would be bound to pay. Not being a payment for which he could call on his landlord to reimburse him, it is a tenant's tax. Being so, this is a tax which is within the exceptions of the Parochial Assessment Act, and should be deducted from the rent. This applies, at all events, to the first and second heads of expense. As to the third and fourth heads, those represent the average amount which would be paid annually, and which would be necessary to keep the property in a state to command the rent.

MELLOR, J.—I have had some doubt in the case. But I agree with my Lord on the two first heads, as to their being tenant's taxes, and therefore to be deducted. As to the other two heads, they are not perhaps tenant's taxes, but certainly they are to be deducted as expenses necessary to keep the premises in a state to command the rent.

SHEE, J.—I, too, have had considerable doubts. The appellant has been rated on an assessment made without reference to an annual charge to which 400 acres of his property are liable. This charge is thrown over eight years. It has been wholly omitted from consideration in estimating the amount of rent. The Parochial Assessment Act contemplated an annual value free from all charges to which the land should be subject. The reasonable rent which a tenant would be expected to give, subject to such charges, and subject to all tenant's rates, &c., is the value intended. It would be impossible to find the nett annual value without making these deductions. No tenant acting reasonably, and knowing the lands to be subject to such charges, would give for them a rent which should not be subject to these deductions.

Judgment for the appellant.

Q. B. } REGINA v. THE INHABITANTS OF
10 Nov. 1864. } CLECKHEATON.

Coram—COCKBURN, C.J., CROMPTON, MELLOR,
and SHEE, JJ.

General Highway Act, 5 & 6 Will. 4, c. 50, ss.
94, 95—*Indictment ordered by Justices—*
Costs of Prosecution.

An indictment was preferred at Quarter Sessions, under 5 & 6 Will 4, c. 50, s. 95, for non-repair of a road. One set of counts described the road as a "common highway," another as an "ancient pack and prime way." An information had been laid before a Justice, under section 94, describing the road as a common highway, and, on the surveyor at the summons

denying the liability to repair, the Justices had ordered an indictment for non-repair of the road, calling it a common highway generally. At the trial the defendants admitted that it was out of repair as a common highway, and that it was an "ancient pack and prime way," but denied that it was a "common highway," and that it was out of repair as a pack and prime way. The jury found for the defendants on both these points:—

Held, that the Justices were not bound to direct the costs of the prosecution to be paid out of the highway rate.

Regina v. The Inhabitants of Heanor, 6 Q. B. 745, followed.

Campbell Foster moved for a rule for a *mandamus* to be directed to J. B. Greenwood, Esquire, and the Magistrates of the West Riding of Yorkshire, requiring them to enter continuances to allow the costs of a prosecution at the Quarter Sessions at Bradford, for the non-repair of a highway under the General Highway Act, 5 & 6 Will. 4, c. 50, ss. 94, 95. The prosecutor, under section 94 of that Act, gave information that an alleged common highway in the parish of Cleckheaton was out of repair. The surveyor attended the summons at the Special Sessions at Bradford, and denied the liability of the inhabitants to repair the road. The Justices, thereupon, under section 95, directed a bill of indictment to be preferred, which ultimately came on to be tried at the last June Sessions at Bradford.

The indictment contained four counts, the two first of which described the road as a "common highway," and the two last as an "ancient pack and prime way." The defendants' counsel admitted the existence of a pack and prime way, and that if it was a cart-way it was out of repair as such. The real contest was, as to whether it was a cart-way, viz., a common highway. Two questions were left to the jury, first, was it a cart-way? Second, was it out of repair as a pack and prime way? They answered both questions in the negative, and the verdict was entered for the defendants. The costs of the prosecution were asked for under section 95, but refused on the authority of,

Regina v. The Inhabitants of Heanor, 6 Q. B. 745.

Campbell Foster, now argued that the Justices ought to have allowed the costs, as the liability to repair was denied by the surveyor, an indictment ordered, and the existence of a pack and prime way admitted by the defendants at the trial.

[COCKBURN, C.J.—Did the Justices direct an indictment for non-repair of the way *quod* cart-way, or *quod* pack and prime way?]

The order calls it generally a highway.

[COCKBURN, C.J.—The construction put on the Act is, that the Justices shall only have power to give the order when the highway is an admitted highway.]

It is admitted to be a pack and prime way at the trial.

[COCKBURN, C.J.—The ground of the decision in *Regina v. Inhabitants of Heanor* is, that the Justices are not supposed competent to decide as to the existence of a highway.]

COCKBURN, C.J.—You cannot give an effect to the order of Justices by preferring an indictment which varies the description of the road.

The rest of the Court concurred.

Rule refused.

Q. B. { GLEDSTANES AND OTHERS v. THE
11 NOV. 1864. { CORPORATION OF THE ROYAL
EXCHANGE ASSURANCE.

Marine Insurance—Re-insurance—Open Policies on "Ships to be declared"—Appropriation of Risk—Declaration—Knowledge of Loss.

The H. K. Insurance Co., by their agents at C., were in the habit of underwriting policies on goods in ships sailing from C., to a port in the U. K., the names of the ships being usually not known till afterwards. Plaintiffs, as agents of the company in London, were in the habit of effecting open policies with defendants, to cover the amounts, if any, which the company might take in excess of 5000*l.* upon any one ship. The first of these policies was "lost or not lost," and expressed to be on goods in the "first-class ship or ships, as may be declared." When one policy was exhausted another was effected, and each succeeding one was expressed "to follow and succeed" the preceding. From time to time, as plaintiffs received advices from the company, stating the names of the ships to which the company had appropriated the risks over 5000*l.*, and the amounts of excess, plaintiffs made declarations thereof to defendants. On the 18th of March it was known to both plaintiffs and defendants, that a ship, the "R. G.," was burnt, but neither party then knew that the company had any risks on goods in her. On the 17th of March the existing policy was filled up. On the 19th of March a similar policy was effected, expressed "to follow and succeed" the preceding one. Plaintiffs afterwards received instructions, dispatched from C., in the February previous, to declare on the "R. G.," in respect of 4738*l.*, the amount of the company's risk in excess of 5000*l.* on her cargo, and thereupon so declared to defendants, who disputed their liability to pay:—

Held, 1st. That the knowledge of the loss of the "R. G.," at the time of making the policy of the 19th of March, was not such as to vitiate the policy; and that to vitiate the policy there must be a knowledge of the loss of the risk insured against:

2nd. That the risk attached to the ship when the appropriation was made at C., so as to cover the ship from the time of her starting. And that the appropriation having been made *bonâ fide*, and so as not to be reco-

cable, and declared to defendants without delay, plaintiffs were entitled to recover from defendants in respect of their loss.

Harman v. Kingston followed.

This was an action brought by the plaintiffs to recover 2715*l.*, the amount of a partial loss alleged by them to have attached under one or other of certain open policies of marine insurance, effected by them with the defendants on goods insured in the sum of 7699*l.* 1*s.* 3*d.*, whereof 4738*l.* was declared on the policies hereinafter-mentioned, by ship or ships, in respect of the cargo of the ship "Red Gauntlet," which ship was totally lost by fire at Calcutta, under the circumstances hereinafter set forth, and by the consent of parties the following case has been stated for the opinion of the Court.

CASE.

The plaintiffs are merchants in London, and act as the agents there of the Hong Kong Insurance Company. This company is established at Hong Kong, and carries on the business of marine insurance there and elsewhere, and they have an agent established at Calcutta, with general authority to underwrite policies on their behalf.

The course of business of the said company, in taking risks, at Calcutta, so far as it is material to the question that arises in this case is as follows:—Merchants at Calcutta intending to make consignments of merchandise, for example, to the United Kingdom, and being desirous of securing insurances upon the same, with the said company, make application to that effect to the agent of the company, sometime before the goods are actually shipped, or even the name of the intended ship is known, or the precise quantity or particulars of the merchandise is defined; and if the application is accepted, a slip—naming the risk accepted in general terms, but without naming the ship or specifying the particulars of the merchandise—is delivered to the assured, and as soon as the particular ship is determined on, a formal policy of insurance, expressed to be upon the whole amount of merchandise which the assured may consign by that particular ship, is drawn up and delivered to the assured. What quantity of merchandise is covered by such policy remains uncertain until the same is actually shipped.

Under these circumstances the said company do not know at the time of issuing a policy of insurance as above-mentioned, what may prove ultimately to be the amount of risk taken by them on any particular ship, and not deeming it expedient to take upon themselves risks to a greater extent than 5000*l.* upon any one ship, the plaintiffs as their agents in London, effect on their behalf with the defendants and others, open policies of insurance to cover the several amounts, if any, which the said company may have taken in excess of 5000*l.* upon any one ship. The maximum amount of value to be

insured in these policies is fixed therein as will presently appear.

In accordance with the course of business, the plaintiffs effected a policy of insurance with the defendants, dated the 8th of October, 1858, and numbered 22,122, for 7000*l.*, the subject of insurance being described and valued as follows:—"Being on goods free of all average, part of 10,000*l.*, to cover the excess of 5000*l.*, which may be taken by the Calcutta agent of the Hong Kong Insurance Company on any one ship, warranted to be shipped on or before the 31st of March, 1859."

The ships were described as being:—"1st class ship or ships as may be declared." A fac-simile of this policy marked A is annexed to and forms part of this case. As a fact, the Calcutta agent of the Hong Kong Insurance Company, had taken risks on goods which exceeded 5000*l.* on single ships, and from time to time, as the plaintiffs received advices from the said company to that effect, stating the names of the ships, and the particulars of the amounts of excess on each ship, the plaintiffs made declaration of the amounts, and names of the ships to the defendants, and indorsements were made of the declarations upon the back of the policy. The following are the indorsements so made on the above policy. [The indorsements are omitted as immaterial to this report.]

The particulars of the subjects of risks covered by this policy, were thus on the 16th of March, 1859, completed, the policy fully appropriated, or as it is sometimes expressed "consumed."

On the 12th of February, 1859, before the last-mentioned policy was fully appropriated, the plaintiffs proposed to effect a further policy of the same kind for 7000*l.* This proposition was made by means of a memorandum, which will be seen indorsed on the back of the last-mentioned policy as follows:—"12th of February, 7000*l.* to follow this;" and this proposal being accepted, another policy numbered 3686/33, and dated February 14, 1859, was effected for 7000*l.*, being expressed to be "on goods part of 10,000*l.*, to cover the excess of 5000*l.* on any one ship, free of all average, to follow and succeed policy No. 22,122, the 8th of October, 1858, warranted to be shipped on or before the 30th of June, 1859." A copy of this policy marked B, is annexed to, and forms part of this case. This policy was in like manner appropriated by declarations, indorsed thereon as before—the last of which being upon part value of a policy on ship "W. W. Smith," was dated the 7th of November, 1859.

A similar policy, a copy of which marked C, is annexed hereto, and forms part of this case, was also opened by the plaintiffs with the defendants, numbered 7529/80, and dated the 31st of March, 1859; also for 7000*l.*, "being upon goods, part of 10,000*l.*, to follow and succeed policy No. 3686, dated the 14th of February, 1859, warranted to be shipped on or before the 31st of December, 1859," and a memorandum was indorsed on policy No. 3686/33, as follows:—"31st March, 7000*l.*, to follow this at 30/." On the

7th of November, 1859, the first indorsement was made upon this policy, and was upon the remainder of the Hong Kong Insurance Company's policy on ship "W. W. Smith," partly appropriated by the last indorsement on the preceding policy as above-mentioned. On the 16th of March, 1860, there remained still 5000*l.* unappropriated upon the open policy, dated the 31st of March, 1859. On the same day the following telegram arrived in London, by the Red Sea and India Telegraph, having been dispatched from Calcutta six days previously.*

"Submarine Telegraph Company, in connection with the British and Irish Magnetic Telegraph Company. Foreign, No. 684. No. 2452. Number of words twenty. At 6:27.

"Friday, the 16th of March, 1860, received the following message. From Malta, dated the 15th. Time, 8 P.M.

"To Lloyds.

"London ship, "Red Gauntlet"; bound to London, burnt and scuttled; some cargo will be saved. Calcutta, March 10, 16; 8:22 A.M. Lloyd Calcutta."

"Lloyds, 28 April, 1864.

"I hereby certify that the above is a copy of a telegram, received here on the 16th of March, 1860.

"GEO. A. HALSTED, Secretary."

This telegram, on the same day, was known to the plaintiffs and defendants.

On the 17th of March, 1860, the plaintiffs, in accordance with the course of business hereinbefore described, appropriated the remaining 5000*l.* upon the above-mentioned policy of the 31st of March, 1859, to insurances in excess of 5000*l.* upon the ships—"City of Manchester," 2000*l.*, "Blenheim," 2000*l.*, and "Agamemnon," 1000*l.*; and on the same day plaintiffs effected with the defendants three specific policies on behalf of the Hong Kong Insurance Company. One on goods per "City of Manchester," for 3000*l.*; another on goods per "Agamemnon," for 4000*l.*; and a third on goods per "Blenheim," for 2000*l.*, part of the risks in respect of the cargoes of those ships having already been placed upon the open policy just appropriated as above mentioned.

On the 19th of March, 1860, the plaintiffs effected a further policy for 10,000*l.*, to follow the policy of the 31st of March, 1859, which was expressed to be as follows:—"Being on goods free of average, &c., and to follow and succeed policy No. 7529/80, dated 31st March, 1859, warranted to be shipped on or before 31st December, 1860."

A copy of this policy, marked D, is annexed to, and forms part of this case. The plaintiffs, in the mode that had been previously pursued when the prior policies were effected, endorsed on the policy No. 7529/80 the following memorandum "10,000*l.* to follow 17th March, at 30*l.*" as instructions for the said policy

of the 19th of March, 1860; and the defendants initialed the memorandum as an acceptance of the risk.

On the 21st of March, 1860, the plaintiffs in due course received from the Calcutta agent of the Hong Kong Insurance Company the following instructions, dispatched from Calcutta on the 15th of February, 1860:—"In our next, by regular mail, you will find particulars for insurances under our open policy for 'Red Gauntlet' and 'Surrey.'"

This was the first intimation received in England of any insurance effected by the Hong Kong Insurance Company upon "Red Gauntlet."

The plaintiffs, immediately upon the receipt of these instructions from Calcutta, notified to the defendants that the declaration of insurance in excess of 5000*l.* on the cargo of the "Red Gauntlet" would be made upon the last-mentioned policy, when the particulars were received their right to declare in respect of "Red Gauntlet" was, however, disputed; and on the 26th of March, the plaintiffs, having received advices from Calcutta that the Hong Kong Insurance Company, as the fact was, had taken risks upon the cargo of the said ship, "Red Gauntlet," to the amount of 4,738*l.*, in excess of 5000*l.*, upon that one ship, endorsed a declaration of that amount, per "Red Gauntlet," on the back of the policy of the 19th of March, 1860, and gave notice of the same to the defendants. The defendants refused to accept or acknowledge such declaration, upon the ground that the burning of "Red Gauntlet" was known to both parties before the policy was effected or applied for. The plaintiffs thereupon wrote opposite the declaration per the "Red Gauntlet" the words, "in dispute;" and after doing so, declared other risks upon the said policy to the full amount, which were initialed by the defendants, as will appear upon reference to the copy of the said policy annexed; but the words "in dispute" were not noticed by the defendants.

The plaintiffs on the 24th of March, 1860, before the last-mentioned policy was exhausted, and while there remained upwards of 5000*l.* unappropriated upon it, effected a further policy with the defendants for 20,000*l.* to follow the said policy of the 19th of March, 1860, a copy of which policy, marked E, accompanies, and is to form part of this case; and a memorandum was indorsed on the said policy of the 19th of March, 1860, as follows:—"20,000*l.* to follow the 25th of March," such date being a mistake for the 24th of March.

Similar policies have been from time to time effected during the currency of the preceding policy, and there remains upon the last of such policies an amount unappropriated more than sufficient to cover the amount for the "Red Gauntlet."

The interest of the Hong Kong Insurance Company, and the validity of the insurances, are admitted as well as the loss, and that the goods were shipped on board the said ship; and that all warranties and con-

ditions were complied with, except so far as the same may otherwise appear on this case; and it is agreed that the amount to be recovered by the plaintiffs (if any), shall be settled by an arbitrator to be named by the parties.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in respect of the excess over 5000*l.* taken by the Hong Kong Insurance Company upon the cargo of the ship "Red Gauntlet." If the Court should be of opinion that the plaintiffs are so entitled to recover, then the plaintiffs are to be entitled to enter up judgment for the sum so to be settled as above-mentioned, together with costs of suit, including costs of reference as to the amount. If the Court should be of the contrary opinion, the judgment is to be entered for the defendants with costs of suit.

The plaintiffs asserted that the memorandum "10,000*l.* to follow 17th March at 30/." was endorsed on the policy No. 7529/80, and initialed by the defendants on the 17th of March, 1860. The defendants said that this was not done before the 19th of March, 1860, and neither party being able to substantiate their position by sufficient evidence, this point was left open in the above case.

All the policies contained the words "lost or not lost."

Lush, Q.C. (Hannen with him), for the plaintiffs.

These successive policies are equivalent to one continuous policy. The essence of the contract between the plaintiffs and defendants was that plaintiffs should never be uninsured. The only effect of there being a series of policies instead of one policy is to postpone the date of sailing. The policies attached on all the ships in which the plaintiffs had an excess of risk over 5000*l.* in the order of their sailing from Calcutta, and the plaintiffs had no power of choosing the ships.

[COCKBURN, C.J.—Surely that cannot be so. The plaintiffs must have had a power of selection.]

Adopting that construction, then, the plaintiffs' principals in Calcutta, as soon as they knew in what ships goods were laden on which they had risks over 5000*l.* might appropriate to those ships the insurances. They immediately sent instructions to their agents in London, the plaintiffs, to make to the defendants a declaration of that appropriation. That appropriation once made was absolutely irrevocable, and the plaintiffs' principals were bound to communicate to the plaintiffs, and the plaintiffs to the defendants, without a moment's delay. The defendants had no option whatever to reject any ship so declared on, provided, 1st, the ship was A1; 2nd, she sailed before a given day, those being the only conditions in the policies.

[CHAMBERLAIN, J.—There is a doubt in my mind on this point. Had the defendants any power to say: "we reject the ship you declare on," if for

any other reason, such as an objection on personal grounds, or in respect of the premium, they disliked the risk?]

No; they reserve no option to reject on any ground whatever. The declaration merely identified the subject matter of insurance; it created no new contract.

Harman v. Kingston, 3 Camp. 150, is exactly similar, and has decided the point.

The fact that the "Red Gauntlet" was known to plaintiffs and defendants to be lost before the policy of 19th March was effected, does not affect the question. The policies were all "lost or not lost." The policy attached the moment the appropriation was made at Calcutta, and this was done in February, one month before the "Red Gauntlet" was lost, though it could not be known to the plaintiffs in London till after the loss of the "Red Gauntlet" was known. The plaintiffs declared to the defendants on the "Red Gauntlet" the moment they heard from Calcutta. The plaintiffs have done everything necessary to entitle themselves to recover.

Bovill, Q.C. (Watkin Williams with him).

The policy attaches not when the appropriation is made in India, but when the declaration is made to the defendants, and not till then.

[COCKBURN, C.J.—You say then that the ship is to go uncovered by insurance during the first part of her voyage—until, in fact, the post brings to England the news that the appropriation was made in India?]

I say when the declaration is once made to the defendants, then the policy reverts back to the time of the ship's starting. But when the declaration was made to the defendants here, there was no subject matter on which the risk could attach, for two reasons—

1st. There was no existing policy. These policies are not equivalent to one continuous policy. "To follow" only means that there should not be two co-existing policies. On the 17th of March the existing policy was filled up and expired. I say the memorandum "10,000*l.* to follow 17th March at 30/" was not indorsed on it till the 19th of March, when the new policy was effected. Between the 17th and 19th of March it was optional with the defendants to effect a new policy or not.

[COCKBURN, C.J.—Surely the essence of the contract between plaintiffs and defendants was, that the plaintiffs should never be uninsured?]

2nd. The "Red Gauntlet" was lost, and therefore there was nothing on which the policy could operate. That the loss was known to the defendants, and that the policies were "lost or not lost," make no difference in this view.

It is essential to the validity of the policy, that the declaration should be made before knowledge of loss. *Harman v. Kingston* is in my favour. It was held

there, that the declaration must be made before the knowledge of the loss, in order to make the policy a valued one.

[SHEE, J.—That is against you, for that shows the policy to be valid.]

The appropriation might be revoked at any time before the declaration was made to the defendants.

[COCKBURN, C.J.—No: that would be a fraud on them.]

Lush, Q.C., in reply.

Here both parties knew that the "Red Gauntlet" was lost; but neither knew that the plaintiffs were in any way interested in her when the policy of 19th March was effected. The only knowledge of loss which can vitiate a policy, is the knowledge that the subject matter, the safety of which is insured by the underwriter, is already lost. Further, if the underwriter chooses to insure with a full knowledge of such a loss, the policy is good,

Mead v. Davison, 3 Ad. & E. 303.

But here the telegram said, "Some cargo will be saved;" perhaps all, perhaps enough to reduce below 5000*l*. Practically the defendants now say, "We don't insure any of your ships that don't arrive safely." The argument that the appropriation is revocable, is fatal to defendant's case.

1 Arnould, Mar. Ins. 221 (2nd ed.), says the declaration "is in no case a condition precedent to the plaintiff's right to recover on the policy,"

Robinson v. Touray, 3 Camp. 157.

He was then stopped.

COCKBURN, C.J.—I think our judgment should be for the plaintiffs. Reversing the order in which the points were argued, the first question is, was there any sufficient policy effected between the plaintiffs and defendants, of which the plaintiffs may avail themselves to recover in this action? I think there was. It is true that the policy was effected at a time posterior to the appropriation of the risk of the assured to the goods on board the ship "Red Gauntlet," and this was one ground on which the defendants contended that the policy was invalid.

It must, however, be taken that the appropriation at Calcutta (to be followed by a declaration in London) was made in anticipation of a policy to be afterwards effected in London. The course of dealing between the parties clearly shows that it was intended, that whenever the principals of the plaintiffs, the Hong Kong Insurance Company, rendered themselves liable to merchants in Calcutta, by being insurers on goods in any one ship to an excess above 5000*l*., they should always be covered, as to that excess of liability, by re-insurance with the defendants. Here the old policy was exhausted on the 17th of March, and the new policy effected on the 19th. I asked Mr. Bovill whether, if the policy now sued on had been effected on the 16th instead of the 19th of March, and therefore

equally subsequent to the appropriation made in the February previous at Calcutta, but prior to the exhaustion of the old policy, that policy so effected would have been sufficiently valid to entitle the plaintiffs to recover on it? He said no; but failed, in my opinion, to support his denial.

The next point contended for by the defendants is, that the policy is invalid, because at the time the policy was effected, the "Red Gauntlet" was, to the knowledge of both plaintiffs and defendants, lost. Mr. Lush's answer was quite satisfactory on this point. It is not the knowledge of the loss of the ship, but the knowledge of the loss of the risk insured against, which can vitiate the policy. At the time the policy was effected it was not known, either to the plaintiffs or defendants, that the principals of the plaintiffs, the Hong Kong Company, were liable as insurers of goods on board the ship "Red Gauntlet," much less that that liability exceeded 5000*l*. When, therefore, after the receipt of the telegram, the new policy was effected, "on ship or ships as may be declared," both parties knew that the risk against which the defendants insured the plaintiffs was only—first, the contingency that the "Red Gauntlet" might turn out to be a ship on which there were goods of which the plaintiffs were liable as insurers; and secondly, the contingency that that liability might be above 5000*l*. I think, therefore, that the knowledge of the loss of the "Red Gauntlet" does not affect the validity of the policy. But be that as it may, if the underwriters choose to execute a policy, "lost or not lost," on goods to be carried in "a ship or ships as may be declared," with a full knowledge that a particular ship, the "Red Gauntlet," is lost, but not knowing that the plaintiffs are in any way interested in that ship; are they, when informed that the plaintiffs are interested in that ship, to turn round and say that the policy goes for nothing? Clearly not. It may well be that the underwriters, looking at the advantages which they derived from the course of dealing between themselves and the plaintiffs, or from other considerations, may be quite willing to run the chance of their having to pay insurance on a ship already known to be lost. But further, it appears from the telegram, that part of the cargo was expected to be saved; possibly all in which the plaintiffs were interested, perhaps enough to reduce their interest to a sum below 5000*l*., and so to exonerate the defendants from all liability. On all these grounds, I think that there is nothing in the circumstances of the loss of the "Red Gauntlet" to vitiate the insurance.

The next question is, whether the fact of the declaration having been communicated to the underwriters subsequently to the loss of the ship being known to both parties, entitled the defendants to refuse payment. Mr. Bovill contended that the policy did not attach upon the ship till the appropriation of the risk and declaration of the ship were communicated to the

underwriters; and that, since this communication was not made till after the knowledge of the loss of the ship, the plaintiffs cannot recover. I think that to hold so would be to frustrate all that was intended between the parties. The Hong Kong company agreed with the defendants that the latter should insure them against all their risks in excess of 5000*l.*, on goods in any one ship. Whether any goods in which the Hong Kong Company had an interest were on board any one particular ship at Calcutta could not be known there till that ship was laden, and was about to sail. The appropriation of the risk to that ship, made by the agents of the Hong Kong Company at Calcutta, could not be known to their agents in London, the plaintiffs, till the arrival of the post, a period probably of about six weeks. Meanwhile, the ship had started on her voyage. Was it intended that during those six weeks, and until the news of the appropriation reached England, the ship was to go unprotected? It is quite impossible. I think that the risk attached as soon as the appropriation was made at Calcutta by the principals of the plaintiffs, and that to hold otherwise would be to frustrate the essence of the contract between the parties.

The next step is, that after the policy had been effected, it was necessary that the Hong Kong Company, by some overt act, should fix the vessel on which the risk was to attach. If they did this so as not afterwards to recede from it, even though they did it at Calcutta, and unknown to the underwriters, that is all that was required. They were no doubt bound to declare their appropriation at the earliest possible moment to the underwriters. Of course, if they made an appropriation really to one ship and afterwards falsely shifted it to another, and declared upon the latter, that would be a fraud upon the underwriters. But provided the appropriation was made *bona fide* in the first instance, and was communicated as soon as possible to the underwriters by a declaration, that declaration would be good though made in the interval between the loading and the arrival of the ship, and the vessel would be covered during the whole of her voyage. In this case it appears, from the facts stated, that all the conditions necessary to enable the plaintiffs to recover were satisfied. I think that this construction is the true one; and it is borne out by the passage cited from the work of that distinguished authority on marine insurance, Mr. Arnould.

CROMPTON, J.—I am entirely of the same opinion. I think the real construction of these successive policies is, that when the preceding one became exhausted by the appropriation of the whole amount on that policy, the next policy was substituted for the former one, so as to keep the plaintiffs covered by insurance in respect of the excess of their risks over 5000*l.*, and that the intention of both parties was, that if the plaintiffs wished to renew from time to

time when the policies became closed up, the new policy was to be treated as following out and keeping up the original arrangement between them, and as giving the plaintiffs every right which they had under the old policy. I do not agree with Mr. Lush's contention that the policies attached on the ships in the order of their sailing from Calcutta, and that the plaintiffs were not at liberty to choose their ships. There is nothing in the policies to mean that. But I am very much inclined to agree with Mr. Lush, that when the appropriation was exercised by the Hong Kong Company abroad, at that moment the risk attached. But whether that be so or not, I think that the appropriation made at Calcutta, and communicated by letter to the plaintiffs in London, and at once acted on by them, as appears from the case, was in good time. The defendants, in fact, said to the plaintiffs, "You may apply the risks to what ships you please, provided they fulfil certain conditions; but you must not change the risk from one ship to another." Even taking the strictest view of the contract, I think it meant that the agents in London were to name the ship in accordance with their instructions received from abroad, and I agree with Lord Ellenborough in *Harman v. Kingdon*, that "a declaration of interest is no contract, and does not require the assent of the underwriters; but it must be communicated in such a manner that the assured cannot recede from it." Here the Hong Kong Company make a *bona fide* appropriation, and nothing occurred to vitiate the naming. I quite agree with my Lord, that the plaintiffs' right to recover is not taken away by the fact that the ship was known to be lost when the policy was effected, and with the grounds of his opinion.

COCKBURN, C.J.—I had intended to say something with respect to Mr. Bovill's contention, that the risk did not attach till the moment when the appropriation was declared to the underwriters. Even if that be so, still he admits that when the risk does attach it has a retrospective operation as from the time when the ship sailed, but yet says that the plaintiffs were deprived of the right to avail themselves of the policy by the intermediate loss. I think that position is quite untenable. If the plaintiffs had a right in the first instance to make an appropriation so as to make the policy cover the risk on a particular ship, then to say that that right was taken away by the loss of that ship happening between the making of the appropriation and the declaration to the underwriters would be in fact to make that right inoperative.

MELLOR, J.—The important point is, what was the contract between the parties? It is clear from the course of dealing, that the object of that contract was that the defendants, on the one hand, should be protected against a double "appropriation" of the risk

by the Hong Kong Company, and that the plaintiffs, on the other, should be protected against the excess of their liability over 5000*l.* I think Mr. Lush has given the right answer to the objection that the "Red Gauntlet" was known to be lost. The loss was not that sort of loss the knowledge of which is material. I agree with my Lord, that the judgment should be for the plaintiffs, and for the reasons which he has given.

SHEE, J.—I am of the same opinion. The "Red Gauntlet" fulfilled all the conditions of the policy, and the plaintiffs' principals had an excess of risk over 5000*l.*, with respect to goods in her. Mr. Bovill says that the words "to be declared" mean "to be declared to the underwriters," and that until that is done, no contract exists. But the contract is clearly to insure the plaintiffs' risk over a certain amount in any ship which fulfilled certain conditions. The engagement to declare must mean to declare here, as soon as it should be known, to what ship the risk had been taken by the act of appropriation already performed in Calcutta. The defendants cannot get out of their liability by saying that when the policy was effected the "Red Gauntlet" was known to be lost, to both plaintiffs and defendants. In my opinion that is not such a loss as to vitiate the contract. No doubt, if the plaintiffs had known that the risk insured against was lost at the time of making the contract, and had kept that knowledge to themselves, the knowledge of such a loss would have vitiated the contract; but the "Red Gauntlet" was not at that time known, to either the plaintiffs or defendants, to be the risk insured against. But I think further, that if an underwriter makes a contract of insurance, with a full knowledge that the risk insured against is lost, he is liable on the contract.

Judgment for the plaintiffs.

Q. B. { STIRLING v. MAITLAND and
15 Nov. 1864. { BOYD.

Covenant—"Displacement" from Service.

*S, as agent to the U. K. Insurance Company, owed the company 1,449*l.* 10*s.* 9*d.* S, not being able to pay, the plaintiff paid the debt to the company, in consideration of which the company appointed the plaintiff their co-agent with S, giving the same remuneration and allowances as when S was sole agent. A deed was entered into between the trustees of the company of the first part, S of the second part, and the plaintiff of the third part; by which, after reciting (inter alia) the above facts, the trustees covenanted with the plaintiff "that in case the said company shall at any time hereafter displace S from his appointment of agent of the said company, at Glasgow," then the said company should and would forthwith thereafter repay to the said plaintiff, his executors, &c., the*

*said sum of 1,449*l.* 10*s.* 9*d.*, or so much thereof as shall not have been previously repaid to the said William Stirling (the plaintiff), or otherwise recovered or received by him."*

The company afterwards agreed to sell and transfer their business to the N. B. Company, and the shareholders of the company confirmed this agreement, and in accordance with a power contained in their deed of settlement, passed resolutions for the winding-up and dissolution of the company, and the company ceased to carry on business:—

Held, that the dissolution of the company and transfer to the N. B. Company, being a voluntary act of the U. K. Company, and S's agency having been thereby determined, that determination was a displacement within the meaning of the covenant, and that the plaintiff was entitled to recover the said sum.

The plaintiff declared in covenant upon a deed of the 7th of December, 1852 (executed by all the parties thereto) made between certain persons as trustees of the United Kingdom Life Assurance Company of the first part, A. B. Seton of the second part, and the plaintiff of the third part; by which, after reciting (among other things) that the company had previously lent to Seton and another the sum of 2000*l.* on certain securities, and that the said sum of 2000*l.* still remained due to the company upon the said securities; and that Seton had for some time past acted as the agent of the company in Glasgow, and as such agent had become, and then was, indebted to the company in the sum of 1,449*l.* 10*s.* 9*d.* in addition to the said sum of 2000*l.*; and that the plaintiff, at the request of Seton, had paid to the company the said sum of 2000*l.*; and that the company had transferred to the plaintiff all the said securities for the same; and that the plaintiff had, at the request of Seton, agreed to pay to the company the said sum of 1,449*l.* 10*s.* 9*d.* upon the company appointing the plaintiff co-agent with Seton at Glasgow, subject to the terms thereafter-mentioned; and that the plaintiff had paid to the company the said sum of 1,449*l.* 10*s.* 9*d.*; and that the company had accordingly, in consideration of the payment to them of the said sum of 1,449*l.* 10*s.* 9*d.*, and subject as aforesaid, agreed to appoint the plaintiff their agent at Glasgow jointly with Seton; and that the company had so appointed him: the said trustees covenanted with the plaintiff—"That in case the said company shall at any time hereafter displace the said A. B. Seton the elder from his appointment of agent of the said company at Glasgow, then the said company shall and will forthwith thereafter repay unto the said William Stirling, his executors, &c., the said sum of 1,449*l.* 10*s.* 9*d.*, or so much thereof as shall not have been previously repaid to the said William Stirling, or otherwise recovered or received by him." And it was further declared and agreed—"That in the event of the said joint agency of the said company at Glasgow being determined by the said company by

the displacement of the said A. B. Seton as aforesaid, the said company reserve to themselves the right of appointing the said William Stirling (the plaintiff) as their agent at Glasgow, or discontinuing his services; and in the event of their appointing him as their agent, the said company reserve to themselves the right of compensating his services as such agent in such manner as they may think proper."

And Seton covenanted with the said trustees, and separately with the plaintiff, that Seton "shall not nor will at any time before the repayment by him to the said William Stirling (the plaintiff) of the said sums of 2000*l.* and 1,449*l.* 10*s.* 9*d.*, undertake the agency, or directly or indirectly promote the interest of any life assurance company other than the said United Kingdom Life Assurance Company, without the previous consent in writing of the said directors for the time being of the said United Kingdom Life Assurance Company, and of the said William Stirling (the plaintiff)."

Averment of the truth of the facts recited, and that all things happened, &c.; and that although the company did after, &c., displace S from his appointment of agent of the company at Glasgow, the said company had not repaid to the plaintiff the said sum of 1,449*l.* 10*s.* 9*d.*, or so much thereof, &c.

Plea.—That the company did not at any time after, &c., displace S from his appointment of agent of the company at Glasgow within the meaning and intent of the said deed.

Joinder of issue thereon.

At the trial at Guildhall, a verdict was taken for the plaintiff, subject to the opinion of the Court upon a case by which the above and following facts were stated:—

The defendants were the sole surviving trustees of the parties to the deed of the first part. Previous to the execution of this deed the company paid Seton as their agent a certain per-centage on all policies effected or collected for the company by him, and other annual allowances in money and otherwise. After the execution of this deed and the appointment of the plaintiff as co-agent, the agency was carried on by Seton under the name of Seton & Stirling, but in the same manner and with the same remuneration and allowances as it had previously been when Seton was sole agent. The plaintiff took no active part in the agency.

In July, 1862, the company agreed, subject to the sanction of the shareholders, to sell and transfer the business, goodwill, and property of the company to the North British and Mercantile Insurance Company. In August and September, 1862, the shareholders of the United Kingdom Company passed resolutions confirming the said agreement, and authorising the directors to execute it; and in accordance with a power contained in their deed of settlement, passed resolutions for the winding-up and dissolution of the company, and the company ceased to carry on business.

The question for the opinion of the Court was,

"whether the said United Kingdom Company has displaced the said A. B. Seton from the appointment of agent of the said company at Glasgow, within the meaning of the said covenant in the declaration mentioned."

M. Smith, Q.C. (with him *W. Murray*), for the plaintiff. The dissolution of the company, and transfer to another company, was a voluntary act, and therefore it is a displacement within the meaning of the covenant. If A. covenants not to displace B. from a chair, it is the same thing whether he pushes him off the chair, or draws the chair from under him. I say the company drew the chair from under the plaintiff.

Tasker v. Shepherd, 6 H. & N. 575;

McIntyre v. Belcher, 2 N. R. 324; 32 L. J. C. P. 254; 14 C. B. (N. S.) 654.

[CROMPTON, J., cited

Charnley v. Winstanley et uxorem, 5 East, 266].

Bovill, Q.C. (with him, *Coleridge, Q.C.*, and *Horace Lloyd*). This is not a displacement within the meaning of the covenant. It is only a covenant to continue Seton in his office so long as the office exists. The plaintiff knew that, by their deed of settlement, the company had power to dissolve.

[COCKBURN, C.J.—There is nothing to import the deed of settlement into the covenant.]

If it had been intended that the money should be repaid on the dissolution, it would have been so expressed.

[COCKBURN, C.J.—The transfer does displace Seton, for there is no obligation on the transferee to employ Seton].

[CROMPTON, J.—In fact the company says, "Security gone, we'll keep your money."]

M. Smith, Q.C., in reply.

The defendants' argument comes to this: if there is a voluntary dissolution, the plaintiff cannot recover.

[COCKBURN, C.J.—Mr. Bovill's argument comes to this: if you contract with a partnership, you must always be subject to lose the benefit of your contract by the dissolution of the partnership.]

[CROMPTON, J.—If Seton had died, or retired, the plaintiff would have lost his money.]

Yes; but that would have been the act of God, or an act external to the company.

COCKBURN, C.J.—I think the plaintiff is entitled to our judgment. Looking at the terms of the deed of covenant, at the recitals therein, and at the engagement entered into between the parties to the deed, it appears that A. B. Seton, being the agent of the United Kingdom Company, owed the company 1,449*l.* 10*s.* 9*d.*; that the company having pressed Seton for payment, and Seton not being able to pay, the plaintiff is minded to pay off the debt for Seton. The question then arises, how is the plaintiff to be secured by repayment from Seton? A deed of arrange-

ment is entered into, by which, in consideration of the plaintiff's discharging Seton's debt, the company engage to appoint the plaintiff as their co-agent with Seton. The plaintiff's object in this, no doubt, was to have the control over the receipt of the money which came into Seton's hands as the company's agent. Then, inasmuch as the whole object of the deed would be defeated if Seton ceased to be the company's agent, comes the covenant in question. It appears that this arrangement continued for some years; and afterwards, the company not being prosperous, and not making those profits which would justify the continuance of the business, the business and liabilities are transferred to the North British Company, and the United Kingdom Company is dissolved. The transfer having been effected, there is an end to the business of the United Kingdom Company, and with it an end to the agency of Seton. The question is, does this termination of Seton's agency come within the terms of the covenant? Practically, I think, the covenant is: "We being an insurance company, and Seton being our agent, secure to you the plaintiff, the repayment by Seton of the 1,449*l.* 10*s.* 9*d.* which you have paid to us for him, by engaging that we will continue Seton in his present employment,"—"so long as we are a company," adds Mr. Bovill, and I accept that limitation. But then there is an implied covenant in that, that they will do no act of their own to put an end to their condition as a company. If a man engage to do a certain act, which engagement can only take effect under an existing state of circumstances, there is an implied covenant that the covenantor shall do nothing of his own free will to put an end to that state of circumstances by the continuance of which alone he can do the act. If the company had come to an end by the force of external circumstances, and not their own act, then it might well be that the covenant would cease to operate. But if the company was put an end to by their own spontaneous act, then, I think, there is a breach of the covenant, and the covenantee is entitled to sue. Now the dissolution was certainly the spontaneous act of the company itself. They have put an end to the state of things in which alone the covenant would have any application.

Possibly the effect of this decision may be to do injustice between the parties. The intention of the deed appears to have been that the plaintiff should recoup himself out of the money coming into the hands of Seton and himself as co-agents, and perhaps there may be ground in Equity to relieve the defendants from their covenant, but that consideration is not a ground on which we can found our decision.

CROMPTON, J.—I am of the same opinion. The plaintiff declares on the covenant that, on the contingency of the company's displacing Seton, the company will repay the plaintiff certain money, and alleges a breach. The defendants plead that they did not displace, within the meaning of the deed. Every

question is withdrawn from us, except the question, whether or not there was a displacement within the meaning of the covenant. The covenant is not that they will not displace, but if they do displace, that they will repay. Mr. Bovill says, "The dissolution of the company was a natural thing to contemplate, and the plaintiff should have provided for it expressly." In *Charnley v. Winstanley* an unmarried woman covenanted to refer certain matters to arbitration and to abide the award. After this and before award made she married. Now her marriage was a very natural thing to contemplate at the time of making the covenant, yet Lord Ellenborough held that by her marriage before the award was made, the woman "incapacitated the arbitrator from making any award to bind her, and thereby broke her covenant to abide the award."

Here "displace" is not a technical word; it is no matter whether the place is withdrawn from him, or he from the place. The plaintiff, in fact, says, "I take the chance of Seton's dying or retiring; but you, the company, pledge yourselves not to determine his place voluntarily." I think this falls within the rule that an indirect act—indeed, I don't know that this is an indirect act—is the same as a direct act when the consequences are identical.

It may be said that this is a hardship on the defendants; but if they had any real defence, no doubt it would appear here or in another Court.

MELLOR, J.—I am of the same opinion.

SHEE, J.—By an agreement in the deed, in the event of the joint agency being determined by the displacement of Seton, the company reserved the right of appointing the plaintiff as their agent or discontinuing his services; and if they appoint him their agent they reserve the right of compensating his services as they think proper; but if they discontinue him, there is no provision for compensation. I think that a consideration of this part of the deed helps to show the meaning of the word "displace." If they did displace him, at all events he was to have the 1,449*l.* 10*s.* 9*d.*, or so much as had not been previously repaid. I concur with the rest of the Court in their judgment.

Judgment for the plaintiff.

C. P.

18 JUNE, 4 JULY, 1864.

READ v. EDWARDS.

Game, Destruction of, by Dog accustomed to poach—Negligent keeping of Dog.

The plaintiff in his declaration alleged that the defendant knew that his dog was accustomed to hunt for and pursue game, and that the plaintiff kept game in a certain wood, but that the defendant so carelessly kept his dog near the said wood, that it broke and entered it, and destroyed the plaintiff's game therein.

The jury found that the dog was accustomed to hunt on its own account, and that the defendant knew this, and did not restrain it:—

Held, that the action was maintainable for the damage to the game so done by the dog:

Held also, that after verdict for the plaintiff, the averment that the defendant knew that the dog was accustomed to hunt for and pursue game should be taken in the sense in which the action was maintainable.

The defendant kept dogs at his house, which was some distance from Hockering Wood, in which, as the defendant knew, the plaintiff preserved game and reared pheasants under hens. One of these dogs had been more than once seen by the plaintiff's keepers poaching on his own account in this wood, and they cautioned the defendant about it, and told him he must keep it at home. The defendant, however, did not fasten the dog up, or take steps to keep it at home; and in the early part of August the keepers again found it, with another dog, which was not proved to be the defendant's, poaching in the wood, and in the act of destroying a large quantity of young pheasants, immediately round the coops in which the hens were confined. The plaintiff thereupon brought the present action.

Declaration [second count], for that on divers days and times the defendant, then knowing that certain of his dogs were accustomed to hunt for and pursue game, and also then knowing that the plaintiff preserved and had game in the wood and plantation of the plaintiff hereinafter-mentioned, so negligently and carelessly controlled, kept, and restrained the said dogs near to the said wood and plantation, that through and by reason thereof the defendant's said dogs broke and entered the said wood and plantation of the plaintiff called "Hockering Wood," situate at, &c., and trod down, damaged, and destroyed the herbage, soil, and underwood thereof, and ran about, hunted, chased, pursued, drove about, and disturbed, and killed, and destroyed the game, pheasants, hares, and rabbits, which were in the said wood; by reason whereof large quantities of the said game, &c., were greatly terrified and affrighted, and caused to leave the said wood and plantation, and were injured; and by reason of the premises the plaintiff hath been and is seriously damnified and injured, and the plaintiff's right to shoot and sport in the said wood and plantation hath been spoiled and damaged, and divers moneys heretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of, and watching the said game, &c., became and were wholly lost to the plaintiff; and the plaintiff was thereby caused to incur greater expense than he would have done in and about the watching and taking care of the said wood, game, &c.; and the plaintiff hath also thereby been deprived of the said game, &c., and of the enjoyment thereof, and of having such pleasure and recreation therein, and other-

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wise, as but for the premises he would have had; and also thereby the plaintiff hath been deprived of divers great gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to the plaintiff therefrom and from the disposal thereof.

To this count the defendant pleaded—

1st. Not guilty.

3rd. That the dogs were not defendant's.

4th. That the wood was not plaintiff's.

5th. So far as related to the alleged right to shoot and sport, that the plaintiff had no right to shoot or have sport as alleged.

6th. That defendant did not know that the said dogs were accustomed to hunt for and pursue game, nor did he know that plaintiff had and preserved game in the said wood.

Issue was joined on these pleas, and at the trial before Cockburn, C.J., at the last Norfolk Assizes, a verdict was found for the plaintiff on the second count, with 5*l.* damages.

A rule was subsequently obtained to set this verdict aside, and enter it for the defendant, pursuant to leave reserved, on the grounds that there was no evidence to go to the jury in support of the declaration, and that the second count was framed for an infringement of the plaintiff's right of shooting and sporting, and there was no evidence of any infringement of such right; or for a new trial, on the ground of misdirection in leaving to the jury the question of the defendant's negligence, and in not telling them that the destruction of the game was no ground of action; or to stay entry of final judgment on the ground that the second count disclosed no ground of action.

18 JUNE, 1864.

Hayes, Serjt., and *Metcalf*, now showed cause.

The count is in case for damage done by a mischievous animal that ought to have been restrained by its owner. The scienter is that the dog was accustomed to hunt for and pursue game; and if it be objected that this is the nature of a dog, so is it his nature to worry sheep, but an action would clearly lie for negligent keeping in that case,

Hartley v. Harriman, 1 B. & Ald. 620;

Cox v. Burbedge, 13 C. B. (N. s.) 430.

If a man fire a gun on his own land near another's decoy, with intent to damnify, he is responsible,

Keeble v. Hickeringill, 11 East, 574 n.;

Carrington v. Taylor, 11 East, 571.

[KEATING, J. — Though there is no property in game, is there not a right to have it kept undisturbed?]

Yes; for it is lawful and profitable to keep game; which is the foundation of Lord Holt's judgment in the decoy case. So in

Hannam v. Mockett, 2 B. & C. 934,

no action lay for disturbing a rookery, because the birds were destructive in their nature, not good for

food, and unprotected by common or statute law, and the plaintiff was at no expense about them; but here all those conditions are reversed, and game is protected by statute,

1 & 2 Will. 4, c. 32.

Then it will be said there is no legal injury, because these were animals *feræ naturæ*. But there is a qualified property in game while on land *ratione soli* and *propter impotentiam*, and if it be started and killed on that land the property becomes absolute,

Rigg v. The Earl of Lonsdale, 1 H. & N. 923;

Blades v. Higgs, 1 N. R. 403; 12 C. B. (N. S.)

501; 13 C. B. (N. S.) 844;

The Case of Swans, 4 Co. 82.

Young pheasants may be the subject of larceny, but that question only arises in arrest of judgment,

Reg. v. Head, 1 F. & F. 350;

Reg. v. Garnham, 2 F. & F. 347;

Reg. v. Cheafor, Den. C. C. 361; 21 L. J. M. C. 43.

[BYLES, J.—May you not treat the case as in trespass?]

In *Reg. v. Pratt*, 4 El. & Bl. 860, 864, Lord Campbell intimated that if the words of the Act, 1 & 2 Will. 4, c. 32, had not been "commit any trespass by entering or being upon any land," the sending in a dog to hunt game would have been a trespass.

[WILLIAMS, J.—There the act was encouraged by the master.]

Consent on the master's part is sufficient,

Dimmock v. Allonby, cited in *Dean v. Olayton*, 2 Marsh. 582.

O'Malley, Q.C., and *Keane, Q.C.*, in support of the rule.

The scienter, and not the negligence, is the gist of the action. Here the scienter alleges that the dog was accustomed not to kill, but merely to hunt and pursue, which is the business of a retriever; and it has never been held that a dog must not be kept because it is its nature to hunt,

Mason v. Keeling, 1 Ld. Raym. 606;

May v. Burdett, 9 Q. B. 101.

Trespass will not lie for what a dog does without the will of his master,

Brown v. Giles, 1 C. & P. 118;

Millen v. Faudry, Poph. 161;

Rea v. Huggins, 2 Ld. Raym. 1574—1583.

Whether the defendant's conduct amounted to an incitement of the dog never went to the jury.

To prove the declaration, the game must have been in such a state that the plaintiff had a complete property in it; but here it was living game, and besides there was no *asportavit*.

Cur. adv. vult.

4 JULY, 1864.

WILLES, J., now delivered the judgment of the Court. (*Williams, Willes, Byles, and Keating, JJ.*)

In this case the declaration stated that the plaintiff

was possessed of land on which he had pheasants and other game, and the defendant was the owner of a dog which was accustomed to hunt for and pursue game, and that that mischievous disposition of the dog was known to the defendant, its owner, who nevertheless was negligent in keeping it, and let it loose; and that the dog entered the plaintiff's land, and injured and destroyed the game thereon. That was the averment, in the declaration, and at the trial before the Lord Chief Justice of England it was proved that the dog had a habit, not merely of chasing and pursuing in the sense in which all or most dogs have that propensity, but that this dog had the habit of going out and of hunting game on his own account; and in that sense the jury found the declaration as to the alleged mischievous disposition of the dog proved; and it was also found that the defendant, the owner, notwithstanding, let the dog loose, and consequently that he did get into the plaintiff's land, and injured a considerable quantity of game, including some young pheasants that were under hens. The Lord Chief Justice directed the jury to find for the plaintiff if that was their view of the facts, and they did so find; but leave was reserved to move this Court to enter a verdict for the defendant. Mr. O'Malley obtained a rule to that effect, or in the alternative to arrest the judgment, upon the ground that no such action was maintainable. The case was argued before my Brothers Williams, Byles, Keating, and myself. We took time to consider, because of the novelty of the case, and I now proceed to deliver the judgment of the Court.

We discharge the rule to enter a nonsuit or a verdict for the defendant, because the declaration was proved, and proved in a sense in which, according to our judgment, there was a cause of action. Had the case turned upon the question, whether the owner of a dog is answerable in trespass for every unauthorised entry of the animal into the land of another, which was the case of the owner of an ox, we should have been slow to answer in the affirmative; but with the exception of that case, in the year-book of Henry VIII., we are aware of no authority for the existence of this more extended liability; and there are reasons, upon which we need not now enter, for a distinction in this respect between oxen and dogs or cats, on account of the difficulty and impossibility of keeping the latter under absolute restraint, and the slightness of the damage they ordinarily do in their wanderings; and the latter class of animals, by the common usage of mankind, are allowed a greater degree of liberty. In the present case, however, we must remember that it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, and that this vice was known to its owner, the defendant, and that he, notwithstanding, allowed it to be at large in the neighbourhood of the plaintiff's wood, in which he knew game was kept;

so that the entry of the dog into the wood, and the destruction of the game, were the natural and immediate results of the peculiar disposition of the dog, which the owner knew of and did not restrain or prevent. We think there is no answer to the action. The law, as at present established by Lord Exeter's case (*i.e. Blades v. Higgs*), in this Court, and in the Exchequer Chamber, recognises in the proprietor of land a right of qualified property in game whilst it is upon the land.

With respect to the rule to arrest the judgment, we are of opinion that that part of the rule ought to be discharged, because after verdict we think the averment in the declaration, that the dog was accustomed to pursue and injure game, ought to be taken to have been proved in the sense in which the action would be maintainable. It is a satisfaction to know that there was good proof, in our judgment, of a cause of action in the present case. Applying the ordinary rule to this portion of the rule to arrest the judgment, and reading the declaration in the sense in which I am inclined to think it ought to be read, the rule to arrest the judgment ought to be discharged, for the reasons I have mentioned.

Rule discharged.

C. P. }
3 Nov. 1864. } LINDLEY v. LACEY.

Written Agreement—Prior Collateral Parol Agreement—Admissibility in Evidence.

The defendant, being lessee of a house, sublet it to the plaintiff, and sold him the goodwill and fixtures; and afterwards drew a bill on him for arrears of rent and unpaid purchase money. This bill was dishonoured, and C, the holder, sued the plaintiff on it. The plaintiff thereupon told the defendant he could not pay the bill, and must call his creditors together, and the defendant then said that, rather than have the business so injured, he would buy it back and take up the bill, if the plaintiff would obtain time from the superior landlord: and this the plaintiff did. Subsequently the plaintiff entered into a written agreement for the resale of the business to the defendant, and thereby authorised him to settle C's action. The defendant did not take up the bill, and the sheriff sold the goods. The plaintiff then sued him for not settling C's action:—

Held, that as the written agreement did not contain all the terms of the contract between the parties, and as the parol agreement was distinct and collateral, evidence of the latter was admissible.

This was an action tried before Erle, C.J., at the sittings for Middlesex after Easter term, in which a verdict was returned for the plaintiff for 145*l.*

The defendant being lessee, under a Mr. Phythian, of a refreshment house in Agar Street, Strand, sold to the plaintiff the goodwill and fixtures, and sublet the premises to him at a weekly rent. The plaintiff, being

pressed for money, accepted a bill for 29*l.* in favour of the defendant for arrears of rent, and 15*l.* unpaid purchase money. This bill, which was at two months, fell due on the 16th of June, while in the hands of Chase and others, trustees of a company with whom the defendant had discounted it, and was dishonoured. Chase sued on this bill, and about the 25th of June the plaintiff was served with a writ in the action of *Chase v. Lindley*. On the occasion of the writ being served the defendant was present, and (according to the plaintiff's evidence) he said to him, "My only straightforward course will be to call my creditors together, and leave them to deal with the case, for I shall not allow one man to take all." To which the defendant answered, "Don't do that, you will damage the whole affair. I would rather buy it back of you, and I will see things made right." The plaintiff: "Are you prepared to take up this bill?" Defendant: "Yes; I will manage that, on condition that you will arrange with Mr. Phythian that he will not press for his rent up to a certain date."

They could not then agree on the amount of purchase-money, and had several subsequent meetings on the subject, at one of which the plaintiff told the defendant that Phythian had agreed to give him time. At last, on the 4th of July, they came to terms, at the house of one Taylor, upon which occasion the defendant said, "Chase's bill shall be settled." On the 7th of July the following agreement was signed by both of them:—

Lindley to sell to Lacey the furniture, &c., for 145*l.*, "to be paid for on Lacey finding a customer, &c. . . in the meantime, Lindley authorises Lacey to settle the action *Chase v. Lindley*, and also to pay the rent now due to Mr. Phythian; such payment to be on account of the 145*l.*, and form part of the same; but the whole of the goods to continue absolutely the property of Lindley until the entire sum of 145*l.* be satisfied. Lacey hereby releases Lindley from the tenancy of the premises from this day, and Lindley gives up to Lacey the possession thereof: and it is declared that Lindley has full power and right to dispose of the goods to Lacey as aforesaid, and has no judgment or incumbrance thereon, which may vitiate the sale to Lacey, so that on the amount of 145*l.* being satisfied, the goods shall then be the property of Lacey absolutely."

As soon as the agreement was signed, Lacey declared that he would not take up Chase's bill, though Lindley had given up to him the possession of the goods and premises. The sheriff then put in an execution on the goods in the action of *Chase v. Lindley*, and sold them, and with the proceeds paid Phythian his rent, and Chase part of his judgment and costs. Thereupon the plaintiff brought the present action, averring in his 4th count, that in consideration that the plaintiff would enter into the agreement set out above, the defendant promised that he would settle the action of *Chase v. Lindley*, and pay the rent due

to Phythian—laying a breach of this agreement; and that in consequence thereof, the plaintiff's goods had been sold at a loss.

At the trial Erle, C.J., admitted evidence of the parol agreement of the 16th of June, and left it to the jury whether the agreement between the plaintiff and the defendant was entirely reduced into writing, or whether there was a parol agreement besides the written one; and the jury found that there was, and gave a verdict for the plaintiff for 145*l*.

A rule was subsequently obtained, pursuant to leave reserved, to enter the verdict for the defendant, on the grounds (*inter alia*) that there was no evidence to support any part of the plaintiff's claim on any count: that evidence of any oral bargain was not admissible, as the contract was subsequently reduced into writing: that if there was any agreement, other than that reduced into writing, it was required by law to be in writing; and that there was no sale other than that under the written contract.

Hayes, Serjt., and *Grantham*, now showed cause.

A written agreement excludes the parol terms which are at variance with it; but that is not so where the parol terms are collateral to the written agreement, and where the writing is not intended to contain the whole of the contract between the parties. Besides, there was another consideration for the bill which was clearly good, viz., getting time from Phythian.

Taking up the bill was the foundation of the contract. They cited,

Roscoe's Law of Evidence, 16 (10th ed.);
White v. Parkins, 12 East, 578;
Harris v. Rickett, 4 H. & N. 1;
Davis v. Jones, 17 C. B. 625;
Pym v. Campbell, 6 El. & Bl. 370;
Green v. Saddington, 7 El. & Bl. 503.

Joyce, in support of the rule.

The parol agreement is, on the face of it, one term of an entire contract, which is by law required to be in writing, as a sale of goods, and of an interest in land, and a promise to answer for the debt or default of another.

[KEATING, J., referred to

Wallis v. Lillell, 11 C. B. (N. S.) 369].

ERLE, C.J.—I am of opinion that this rule should be discharged. The plaintiff and defendant were in treaty respecting the sale of certain goods from the former to the latter: that treaty originated in an action by Chase, in which these goods were about to be taken in execution by the sheriff. In that event, the goodwill of the business would have been greatly injured, and it was much for the defendant's interest that the goods should not be taken. Ultimately, Lindley, at Lacey's request, entered into a written agreement that Lacey should have these goods. But there was also a distinct collateral agreement that Lacey should stay Chase's action: it was a collateral

thing to be done *quum primum*, and distinct from the main agreement. This is the plaintiff's account, and the jury find it is a true one (his Lordship here went through the plaintiff's evidence on this point). In effect the case is almost this; Lacey says, in consideration that you will put your hand to that agreement, I will stop Chase's action. The cases cited by my Brother Hayes all come to questions of fact, what was the intent of the parties to be gathered from the instrument? If the jury find a distinct collateral agreement not in writing, the law does not prevent that from taking effect, and being given in evidence.

BYLES, J.—I am of the same opinion. There is here a prior collateral agreement relating to this bill, which the subsequent written agreement does not interfere with at all. *Harris v. Rickett* is precisely in point; and *Pym v. Campbell*, *Davis v. Jones*, and other recent cases, show that parol evidence is admissible of a condition on which the written agreement depends.

KEATING, J.—I am of the same opinion. It was the interest of the parties to make a distinct preliminary agreement, such as the jury have found.

Rule discharged.

C. P. } INCHBALD v. THE WESTERN
 10 Nov. 1864. } NEILGERRY COFFEE, &c.,
 COMPANY (Limited).

Party to Contract rendering himself incapable of Performance—Rescission—Measure of Damages.

*The directors of a company which was in the course of formation for the purchase of an estate in India, and the growth of coffee thereon, appointed a broker to the company, on the terms that he should have 100*l*. down, and 400*l*. more on the allotment of the whole of the shares. On the 25th of February the directors learnt that the vendor of the estate refused to carry out his agreement with them, and they consequently determined to wind up the company without attempting to enforce the agreement; but did not inform the broker either of the repudiation, or of their intention to wind up. The broker first learnt these facts in May, and applied to the company for the additional 400*l*., and on their refusal to pay him sued them:—*

Held, that as the directors, by their own act in winding up the company, had made it impossible that the rest of the shares should be allotted, the plaintiff was entitled to recover either as damages, or for work done:

*Held also, that the sum to which he was entitled was the 400*l*., less an allowance for the chance of the plaintiff not being able to dispose of all the shares if the company had gone on.*

Declaration for work and labour as a commission agent and broker. 2nd Count, "for that it was agreed

by and between the plaintiff and the defendants, that the plaintiff should become and be and act as stock-broker to the defendants, in and about the selling and disposing of shares in the said company, for reward to the plaintiff in that behalf, to be paid by the defendants, that is to say, 100*l.* to be paid down, and 400*l.* in addition on the allotment of the whole of the shares of the said company; and thereupon, in consideration of the premises, and that the plaintiff then promised the defendants to fulfil the said agreement on his part, the defendants then promised the plaintiff to permit and suffer him to act as such broker, and to sell and dispose of the said shares for the defendants as aforesaid (performance by plaintiff of conditions precedent); yet the defendants, without any reasonable cause or reason, wrongfully refused to permit the plaintiff to act as such broker, or to sell and dispose of the said shares for the defendants as aforesaid; whereby the plaintiff was prevented from earning the said 400*l.*, to be paid to him in addition," &c.

The defendants pleaded, except as to the last count, never indebted and payment; and to the last count non assumpsit, and traverse of the breach.

The directors of the defendants' company issued a prospectus stating their capital was to be 50,000*l.*, in 5*l.* shares; that their object was to purchase certain estates in India for the growth of coffee, &c.; and that "the purchase-money for these estates was 30,000*l.*, one-third part of which was to be taken in shares by the vendor." The plaintiff, who was a stock and share-broker, seeing this prospectus, attended a meeting of the directors in October, 1862, and on the 8th of December following the board passed this resolution:—

"Resolved by the Board that Mr. John Inchbald, of No. 2, Copthall Court, be appointed stock-broker to the company, on the following terms, viz., 100*l.* paid down, and 400*l.* in addition on the allotment of the whole of the shares of the company."

The plaintiff, who was not a shareholder himself, succeeded in placing a considerable number of shares. On the 20th of January, 1863, the directors, finding that all the shares were not allotted, resolved that they should be allotted on the 24th of February, and proposed that the few hundred shares remaining, or the greater part of them, should be taken up by themselves.

The company was got up by a Mr. Lascelles, who, as agent for his son, then in India, contracted for the sale of the property to the company. By resolution of the 25th of February, 1863, the Board admitted that Mr. Lascelles had authority to act as he had done, and had not exceeded that authority. When however Lascelles the son came to England, he refused to ratify the agreement. On the 19th of February, 1863, he wrote to his father to this effect, and on the 25th of February the letter was laid before the Board. The plaintiff knew nothing of this repudiation till the 6th of May, when his brother, who

was a shareholder, showed him a circular of the directors, stating that the vendor repudiated the contract, and would only sell on terms to which the directors could not consent, and that in consequence the company would be wound up, and the deposits returned. On the 13th of May the plaintiff wrote to the defendants' secretary, demanding the additional 400*l.*, and this they refused to give him. The plaintiff now sued for the 400*l.*

At the trial before Williams, J., the verdict passed for the plaintiff.

Edward James, Q.C., subsequently obtained a rule, pursuant to leave reserved, to set this verdict aside and enter it for the defendants, or for a nonsuit, on the ground that on the evidence the plaintiff was not entitled to recover anything against the defendants, the Court to draw inferences of fact, and assess the amount to be recovered, if any.

Karslake, Q.C., and Henry James, now showed cause.

The plaintiff acted on the faith of the representations in the prospectus, and was never informed that the vendor repudiated the agreement. He is entitled either on a *quantum meruit*, the defendants having incapacitated themselves from carrying out their contract with him, or on the special count. But for the winding up, all the shares would have been allotted; but the Board took it out of the power of the plaintiff to earn the rest of his commission before a reasonable time had elapsed for placing all the shares. If the agreement for the purchase was a good one, the directors should have enforced it: if it was not, it acts as a *quasi estoppel* on them,

Cutter v. Powell, 2 Sm. L. C. 1;

Planché v. Colburn, 8 Bing. 14;

Prickett v. Badger, 1 C. B. (N. S.) 296;

Moffatt v. Laurie, 15 C. B. 583; 24 L. J. C. P. 56;

Green v. Bartlett, 2 N. R. 279; 14 C. B. (N. S.) 681.

Prentice, in support of the rule.

The company were guilty of no default, and the allotment was prevented by the wrongful act of another. They only contracted that they would not prevent the allotment by any wrongful act or default of their own. If the directors had enforced the agreement for the purchase, the public would have known of the litigation, and it would have been impossible to allot the shares. The plaintiff cannot rescind his contract,

Story's Law of Agency, § 324;

Simpson v. Lamb, 17 C. B. 603; 25 L. J. C. P. 113.

ERLE, C.J.—This is an action by the plaintiff to recover 400*l.* on a contract with the defendants, under which he was to be paid 100*l.* down, and 400*l.* more if all the shares were allotted. As all the shares were not allotted, he would not be entitled to the 400*l.*

But according to the cases from *Planché v. Colburn* downwards if a party to a contract has by his own act rendered himself incapable of performing his part of it, the other party may recover for what he has done under it. Here, I am of opinion that the defendants by their own act in winding up the company made it impossible that the rest of the shares should be allotted, though less than 1,000 remained to be allotted at that time. By their own act they prevented the plaintiff from becoming entitled to the 400*l.* under the contract.

The question remains, to what amount of damages the plaintiff is entitled? and the answer is, to what he has lost by the wrongful act of the defendants. If the defendants had entered into litigation to enforce the agreement with Lascelles, it might have been that no one would have taken another share. Therefore what the plaintiff lost was, if I may say so, a risk, under which he might in one event be entitled to nothing; while, on the other hand, if Lascelles had been sued, he might have given in at once, and the plaintiff might then have got off the rest of the shares. I hold the defendants responsible with the less scruple, because the plaintiff acted with perfect good faith, while the defendants, though persons of the highest respectability, and though they knew of the repudiation in the early part of 1863, still went on and never communicated the situation of affairs to the plaintiff, who at last learnt it by an accident. Making the best estimate we can, we think the plaintiff entitled to 250*l.*

WILLES, J.—I am of the same opinion. The case is illustrated by one in *Bulstrode** where a man agreed to sell another a horse, but there was not a real and substantial performance of the agreement on the part of the latter, so that one contracting party had done an act which prevented the other from having the benefit of the contract. It is a pity that the defendants, who clearly meant to act with good faith towards all parties, did not, when they heard of the repudiation, call in the plaintiff and inform him of it. Either as damages, or as payment for work done, the plaintiff ought to receive the 400*l.*, less an allowance for the risk which there certainly was, and which the defendants by their acts turned into a certainty against the plaintiff.

BYLES, J.—The defendants admit a contract not to prevent the shares being allotted; but the proximate and immediate cause of the non-allotment was, that they wound the company up. I by no means say that the defendants may not have a right to go behind that cause, but that cause is certain, and all behind it is mere conjecture.

KEATING, J., concurred.

Rule discharged.

* Apparently the learned Judge was referring to *Lee v. Adams*. 3 Bulet. 35.

C. P. } MALLAN v. RADLOFF.
10, 11 Nov. 1864.

Warranty—Fitness for a Particular Purpose.

The plaintiff came to the defendant's warehouse and inspected some soap-frames which were lying in pieces there, and afterwards ordered and paid for them as "new iron soap-frames—warranted new frames, with all nuts and bolts complete and perfect." The order and invoice, which contained the above words, constituted the contract. When put together the plaintiff found that the frames leaked, and were useless for making soap, and sued the defendant on an alleged warranty, "that they were fit and proper to be used for the purpose of making or manufacturing soap":—

Held, that the warranty proved supported that declared on.

Declaration.—"For that the defendant, by warranting that certain soap-frames were then fit and proper to be used for the purpose of making or manufacturing soap, sold the same to the plaintiff, to be used for the purpose aforesaid; yet the said frames were not then fit and proper to be used for the making or manufacturing of soap, whereby," &c.

The defendant pleaded a denial of the sale and warranty, and that the frames were fit and proper to be used for the making of soap.

The defendant, having originally intended to go into the soap trade, bought nine soap-frames without a warranty. The foreman of the plaintiff, a soap manufacturer, hearing that these frames were to be disposed of, came to the defendant's premises and inspected them. They were then lying about in the warehouses in pieces, and were not put together so as to constitute a machine. The defendant next day sold six of these frames to the plaintiff, who thereupon wrote to the defendant a letter in the following words, with the exception of those in brackets:—

"St. Luke's Soap Works,
"63, Golden Lane.

"SIR,—Please send to the above address the six new iron [soap] frames, which were seen yesterday, on the following conditions; viz., they are to be warranted new frames, with all nuts and bolts complete [and perfect], and to be delivered free of expense on Monday next between 12 and 2 o'clock. Please send a receipt for 24*l.*, as cash will be sent on delivery."

The frames were accordingly delivered and paid for, the invoice containing a warranty in the same terms as above, with the addition of the words in brackets. The plaintiff, however, on putting together and attempting to use the frames in his business, found that they were cracked and injured, and that the joints did not fit close; they were consequently useless for making soap, and would not even contain the liquid mixture poured into them. He accordingly brought this action,

and at the trial, before Keating, J., the jury found that the letter and the invoice together formed the contract, and that the plaintiff paid for the frames on the faith of that contract, and gave their verdict for him.

A rule was subsequently obtained, pursuant to leave reserved, to enter a verdict for the defendant or a nonsuit, on the ground that the warranty proved did not support that laid in the declaration.

Petersdorff, Serjt., and Kenealey, now showed cause.

No machinery is "complete" unless capable of being used for the purpose for which it is ordered. This is not like the sale of a specific article, and the defendant perfectly understood what the plaintiff wanted,

Jones v. Bright, 5 Bing. 533.

D. Seymour, Q.C., and, *J. A. Russell*, in support of the rule.

1st. Where a man inspects and buys a specific article, the maxim *caveat emptor* applies.

[KEATING, J.—But these were only the elements of a specific article.]

2nd. The warranty will not support the declaration. The words "complete and perfect" only apply to the nuts and bolts, and the warranty only begins at the word "warranted;" the rest is matter of description only. No fraud is imputed, and it was no fault of the defendant that the plaintiff did not see the defects. They cited,

Chanter v. Hopkins, 4 M. & W. 399;

Parsons v. Sedon, 4 C. B. 899;

Prideaux v. Bunnett, 1 C. B. (N. S.) 613;

Olivant v. Bayley, 5 Q. B. 238;

Bigge v. Parkinson, 7 H. & N. 955; 31 L. J. Ex. 301;

Budd v. Fairmaner, 8 Bing. 48.

ERLE, C.J.—This is an action on a contract, brought by the purchaser of soap-frames against the vendor, and he alleges that the vendor contracted that the frames were fit to be used for the purpose of making soap. The jury found for the plaintiff, on the ground that they were not fit for that purpose. The plaintiff was a soap-maker, and the defendant at one time intended to become so, and had procured a machine for the purpose of manufacturing soap. The plaintiff's foreman called at the defendant's warehouses, and saw the pieces of metal lying about which, when put together, constituted the machine. When he had thus inspected the constituent parts, the plaintiff ordered them, on condition that they were warranted new frames, with all nuts and bolts complete; and he afterwards accepted them; but there must be added to that order the words which were found by the jury to be a part of the contract; and the jury further found that the plaintiff paid for the frames on the faith of that contract.

I am of opinion that these writings, with the surrounding circumstances, are good evidence of the

warranty declared on. All questions of contract must depend on the intent of the parties to it expressed in the terms of the contract. Here the words are "complete and perfect." Can it be said that the purchaser, relying on such words as those, contemplated soap-frames being delivered to him which not only would not make soap, but even if the materials for making soap were put into them would let it run out? These words must mean that the frames should be fit to be used for making soap. So much on the words of the contract.

In *Budd v. Fairmaner* it was held, that the warranty was confined to soundness, because that was the intention of the parties, and the preceding statement was matter of description only. But I protest against the doctrine, that the words of a contract are not to receive their fit meaning on account of their collocation: for effect must be given to every word of the parties in the contract. In *Behn v. Burness* (2 N. R. 184; 32 L. J. Q. B. 204), my Brother Williams well shows where the words of a representation are mere surplusage, where they are matter of description, and where they amount to a condition.

Much was said as to these frames being ascertained articles. No doubt, when the subject-matter of a contract of sale is ascertained by proper name or inspection, the property passes by the sale; and if the article turns out differently from what he expected, the vendee cannot repudiate the sale. That is apparently all that Mr. Russell's client could gain by showing that these were ascertained articles. This action is on a stipulation alleged to be contained in the contract beyond the name of the article; and the part of the contract in question must have its effect just the same, whether the article be ascertained or not.

BYLES, J.—I am of the same opinion, though I was inclined to go a long way with Mr. Russell in his able argument. The words "complete and perfect" are not to be taken in that part of the contract which contains matters of description, but as warranty. The question of implied warranty does not arise; and the express warranty is in the words "complete and perfect." It is a rule in the construction of all written documents, that every word is to have its force and efficacy; and these words imply mechanical perfection—"complete," with all necessary parts; and "perfect," i.e., with all the parts well and perfectly fitted up.

KEATING, J., concurred.

Rule discharged.

C. P. } HORWOOD v. WOOD and Others.
15 Nov. 1864.

Service of Writ—Common Law Procedure Act—Cause of Action.

A contract was entered into by letter between the plaintiff in London and the defendant in Africa.

On the defendant being served with a writ, under the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) :—

Held, that there was a "cause of action within the jurisdiction" within the meaning of that section.

In this case a writ had been served under these circumstances. The plaintiff, a merchant in London, sued the defendants, merchants at Graham's Town, Cape of Good Hope, for 2,800*l.*, which was claimed under a contract made between the parties by letter—the one living in the colony, and the other in London. The writ was served upon the defendants at Graham's Town by virtue of the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which provides that a British subject resident out of the jurisdiction may be sued and served with a writ for a "cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction."

Watkin Williams now moved to set aside the service, on the ground that there was no "cause of action within the jurisdiction," and that those words meant an entire cause of action. He cited

Sichel v. Borch, 3 N. R. 438; 33 L. J. Ex. 179; where it was held that the indorsement of a bill of exchange by a merchant in Norway to a merchant in London would not justify the service of a writ under this section.

THE COURT (*Erle, C.J., Byles and Keating, JJ.*) were unanimously of opinion that the section did apply.

Rule refused.

EX. } THE ATTORNEY-GENERAL
6, 8 JUNE, 1864. } v. LORD LILFORD.

Succession Duty Act, 16 & 17 Vict. c. 51, ss. 10, 21—Succession to an Estate Tail afterwards converted into an Estate in Fee Simple.

By section 21 of the Succession Duty Act, the duty on real property, which is payable by instalments, remains a charge upon the estate in the event of the successor's dying before all the instalments are paid, if the successor "shall have been competent to dispose by will of a continuing interest in such property" :—

Held [Pollock, C.B., dissentiente], that these words referred to the competency of the successor not at the time of his succession, but at any time during his tenure, and that where a successor had succeeded to an estate tail, which he had converted into an estate in fee simple, it remained liable for the duty after the successor's death.

This was a proceeding by way of English bill and answer, instituted by the Attorney-General to obtain payment of succession duty, alleged to have become due on the succession of the late Lord Lilford, the defendant's father.

The bill alleged, in substance, that the late Lord Lilford had succeeded to the estate which it now sought to charge with the duty as tenant in tail; and had in November, 1860, by deed duly enrolled, barred the entail, thereby becoming tenant in fee simple. He died in March, 1861, none of the instalments of succession duty due under section 21 of the Act having been paid. His son, the present Lord Lilford, succeeded to the estate by virtue of a will made by his father in February, 1841. The question which arose for the decision of the Court was, whether on the proper construction of the 10th, 21st, and 42nd sections of the Succession Duty Act, 1853 [16 & 17 Vict. c. 51], the duty payable on the succession of Thomas Ather-ton Lord Lilford had ceased to be payable on his death, or whether it was a continuing charge on the property.

6 JUNE, 1864.

The Attorney-General, The Solicitor-General, Locks, Q.C., and Hanson, for the Crown, contended, that on the proper construction of the 21st section of the Succession Duty Act, when read in conjunction with the 10th and 42nd sections, the duty remained payable upon an estate of which the successor had been at the time of his death competent to dispose by will of a continuing interest in the property.

They referred to,

The Attorney-General v. Hallett, 2 H. & N. 368; 27 L. J. Ex. 89.

Mellish, Q.C., and J. Brown, contra, contended, that the duty remained payable only where the successor at the time of his succeeding to the property, became at once competent to dispose by will of continuing interest in it. They argued that the construction which the Crown was seeking to put upon the statute would place the estate of a successor who had succeeded as tenant for life, and afterwards acquired the remainder by purchase, or otherwise, in the same position as the estate of a successor in fee simple; and that this could not have been the intention of the Legislature.

The Attorney-General, in reply.

Cur. adv. vult.

8 JUNE, 1864.

The following judgments were now delivered :—

MARTIN, B., delivering the judgment of himself and CHANNELL, B., after stating the facts of the case, said—

We think that the Attorney-General is entitled to judgment. The question depends on the true construction of the Succession Duty Act, 16 & 17 Vict. c. 51. By the 42nd section the duty is declared to be a first charge on the interest of the successor, and of all persons claiming in his right, and by the 21st section it is declared that the interest of the succession in real property shall be considered to be of the

value of an annuity equal to the annual value of such property, and to be valued according to the tables in the schedule, and that the duty chargeable shall be paid by eight half-yearly instalments. But there is a provision that, if the successor shall die before the instalments shall become due, the instalments not due at his decease shall cease to be payable, except in the case of a successor "who shall have been competent to dispose by will of a continuing interest in such property." The word "property" in the section means a thing, that is, the land or hereditament in respect of which the duty is charged. This is clear from the 21st section itself, and from the interpretation clause, and not only was the late Lord Lilford competent to dispose by will of the continuing interest in the property, but he actually did so, and the defendant was the object of his bounty. We think that this brings the case within the exception grafted on the proviso, and that the consequence follows, as declared in the section, namely, that the instalments unpaid at Lord Lilford's death were and are a continuing charge upon his interest, and are payable by the defendant, who, for the time being, is the owner of such interest. It was argued that the defendant would be by this construction compelled to pay two succession duties, one on his own succession, and the other on the testator's—this is a fallacy. He is liable, of course, to pay his own succession duty properly so called; but what he is now required to pay is a charge or debt of the testator, who was the owner in fee simple of the amount devised to him; and we think that not merely does the 21st section of the Act impose the liability, but that reason and good sense and the spirit of the Act concur. The testator was liable to the duty; had he been merely tenant for life, and died within four years, the instalments unpaid would have ceased to be payable; but he was owner in fee, and why should not his fee simple interest be liable for his debt? Cases were put of a tenant for life, and a tenant for years purchasing the reversion in fee. We do not think that there would be any great difficulty in arriving at a correct conclusion in such cases; but for the present it is sufficient to say, that this case is a devise by will by an owner of the fee simple acquired by his own acts.

BRAMWELL, B.—In this case it is clear that, but for the latter part of section 21, the duty claimed would be due from the deceased Lord Lilford, payable, that is, out of his assets. The question then is, whether that part of the section causes it not to be due, or, if due, not a charge on the present defendant or the estate he has taken. Now it is not easy to understand the enactment in question. The statute has imposed a duty on successions, or on real property on succession to it. It has therefore very fairly and reasonably taken each successor's interest to be taxed as not greater than a life interest; because, on the

successor's death, there is another taxable succession. If land is devised to A for life, on his death it is subject to a fresh succession duty; and so it is if it is devised to him in fee. Then, to estimate what shall be paid, the value of his interest is taken to be the value of an annuity equal to the annual value of the property for his life. This value is then assessed, and found for better for worse; but, for the successor's convenience, the duty is made payable by instalments. This being the principle on which the Legislature has proceeded, it is difficult to see why the successor to a life estate is relieved from unpaid instalments if he dies before they are due, while the successor in fee is not. Nor is it easy to see why, if the successor in fee lives four and a half years, he pays all the instalments without return, and no more if he lives fifty, but has an abatement if he lives less than four and a half years. Further, the language of the exception to the proviso is remarkable. It means, I suppose, to say, first, that the instalments shall be payable; secondly, that they shall be a continuing charge on the successor's interest; thirdly, that his other property is to be exonerated; and, fourthly, that the owner of the land shall pay the duty. The first is enacted by implication only. It may be a question whether the last provision exonerates the first successor's personal estate, or whether it makes the next successor liable beyond his interest; so what would be comprehended by the words "continuing interest" may be doubtful. However, those are the enactments; and it seems to me clear, that, whatever the proviso may free, the exception to the proviso makes the owner of the property, in respect of which the succession duty was due, liable for it,—at least, to the extent of his interest, when a first successor shall have been competent to dispose by will of a continuing interest in such property. The question then is, was the defendant's father so competent? I agree with the Attorney-General that this particular case must be decided, and that the difficult cases which may be suggested must be met as they arise. Now, I think Lord Lilford was so competent, in fact he did dispose by will of the "continuing interest;" no doubt, as a preliminary step, a disentailing deed was necessary, but the taking that preliminary step was within his competence, depending solely on his pleasure whether or no it should be taken. In *Saltoun v. The Lord Advocate* (7 H. of L. Ca. 1; 3 W. R. 565), Lord Campbell justly said that this statute, being applied to the whole kingdom, the technicalities of the law of England and Scotland, when they differ, must be disregarded, and that the language of the Legislature must be taken in a popular sense; and can it be doubted in the present case that, in popular language, Lord Lilford was competent to dispose by will of a continuing interest in this property? Again, in *Lord Braybrooke v. The Attorney-General* (9 H. of L. Ca. 150; 31 L. J. Ex. 177), the House of Lords held that an estate tail, though technically ended upon the re-settlement of the estates, continued in reality for

the purposes of the succession duty. See the judgment of Lord Kingsdown in that case, and the *Attorney-General v. Floyer* (9 H. of L. Ca. 477; 31 L. J. Ex. 404). For these reasons, and on these authorities, I think the Crown entitled to judgment.

POLLOCK, C.B.—I regret that I am not of the same opinion as my learned brethren. In this case the claim of the Crown appears to me very reasonable, as the difference between an estate tail and an estate in fee simple seems to me for the purpose of this question scarcely more than technical; and not only is the claim of the Crown reasonable under the 21st section, but further, that section, without any violence being done to its language, may be fairly read so as to support the claim of the Crown. But in construing this 21st section, we are bound to look not merely at the case before us, but at other cases which may arise; and, assuming the construction to be doubtful, to put such a construction as will be uniform and consistent with reference to all the questions that have come before us of a similar nature. The claim of the Crown is in amount and in time of payment precisely the same for a succession to an estate in fee simple, as for a succession to an estate in tail, or to an estate for life: and, provided all the successors live according to the expectation of life,—that is, unless the tenant in tail, or the tenant for life, prematurely die—they all pay exactly the same succession duty, the reason for which may be shortly stated—that a man cannot enjoy an estate for a longer period than his own life—therefore, whether he occupies as tenant in fee, tenant in tail, or tenant for life, he pays the same duty in the event of his living a certain time, the only difference between them being, that in the event of the death of the tenant in fee before all the instalments are paid, the unpaid instalments continue to be a charge upon his estate—not on his property generally—but on his interest in the estate which gives rise to the claim for succession duty; so that the Crown does not claim on his personal property, or any other part of his estate, but claims the instalments as they become due from the person who by will or in any other way gets the property which gives rise to the succession duty. The difference between a tenant in tail and a tenant in fee is not, however, purely technical; the tenant in tail may, by executing a disentailing deed, acquire the fee absolutely: but then he must be of full age, or he cannot execute such a deed, and he must be in possession long enough for the preparation and execution of the deed. Supposing him to have executed the deed, and to have thereby acquired a fee, and become competent to dispose by will of a continuing interest in the property, is he, within the expression of the 21st section, a successor who shall “have been competent,” &c., because he has undoubtedly become competent? Now, if in the case of a tenant in tail acquiring a fee by executing a disentailing deed, we read the words of the 21st section as if they had been, “shall have been

competent, or shall become competent”—in other words, if we construe the 21st section so as to include the successor who after the succession becomes competent to dispose by will of the continuing interest, we must construe it in the same way in all cases, and we must construe it in the same way if the successor was merely a tenant for life, the remainder going to some other person, and the tenant for life acquiring the remainder by purchase, or under the will of the person entitled to it. Referring to this and to similar cases which might be put, I think, the reasonable and true construction of the whole Act, and especially of this clause in it, is, that with respect to a particular succession, the liability of the successor and the claim are fixed and settled by the state of things at the time the succession takes place, and cannot be altered by the subsequent acts of the successor himself, or any other person. I do not know what would have been the opinion of my learned brethren in the case of a tenant acquiring the remainder by purchase, or by its descending to him in consequence of the death of the intermediate heir. In the latter case there would be some ground for contending that the charge would be continued, otherwise he would succeed to a remainder, for which he would pay no succession duty; but the answer to this is, that by the 21st section an interest is to be valued according to certain tables and by certain rules, which make the value of a remainder after a man's own life nothing at all. Now I think it is clear that the words of the 21st section, “a successor who shall have been competent,” &c., may mean, as no time is mentioned, either the time when he becomes successor or any subsequent time. The latter mode of construing the words gives to them the same effect as if the language had been “a successor who shall have been competent, or who shall have subsequently to the succession become competent,” and if those words had been used, there would have been no doubt that the former mode of construing the words gives to the sentence the same effect as if the words had been “except in the case of a successor who shall have been at the time of his becoming successor, competent,” &c. If the inquiry be, which of these interpolations—for in either case there must be an interpolation of certain words to make the matter clear and free from doubt—is least violent, I should decide in favour of the latter; and I think that the successor is spoken of with reference to the precise time when he becomes successor, and not to the subsequent period after he has actually succeeded; and that the uniform, consistent, and just construction of the words of the 21st section would lead to a judgment for the defendant; but the majority of the Court being of a different opinion, the judgment must be for the Crown.

Judgment for the Crown.

Ex. } PRICE and Another v. KIRKHAM
11 Nov. 1864. } and Another.

*Principal and Surety—Rules of Loan Society—
Liability of Surety.*

The rules of a loan society are not binding on the society as against one who has become surety for a loan advanced by the society to one of its members, such rules not forming part of the contract made with such surety.

This was an action by the treasurer and secretary of the Derby and Derbyshire Mutual Loan and Investment Society, on a bond and promissory note against the defendants, who had become sureties for a loan advanced by the society to one of its members.

Verdict for the plaintiffs, with leave to the defendants to move to enter it for them, if the following facts constituted a legal or equitable defence.

The book of rules of the society contained a rule that "every member entitled to receive a loan, before receiving it, or any part thereof, gives such security at the borrower's expense as the committee determine," &c. Another rule, after stating other duties of the committee, continued—"if any member, who has had his share advanced, becomes more than four weeks' payments in arrears, they immediately inform the sureties of the same, and have power to institute legal proceedings against them," &c.

There was no proof that this book was put into the sureties' hands. No information of the principal's payments being in arrear was given to the sureties for several years.

Field, Q.C., having obtained a rule *nisi* as above,

Hayes, Serjt. (*Mellor* with him), now showed cause. He cited,

Brown v. Langley, 4 M. & G. 466 ; and argued that evidence of the rules was inadmissible to vary the defendants' contract, and that the rules were not binding at all upon the society as against the sureties.

Lucius Kelly (*Field, Q.C.*, with him), in support of the rule, argued that the defendants were, equitably at least, entitled to the benefit of this part of the rules, which was made for their information, and therefore for their benefit ; and that their real contract was to pay only in a certain case. He cited,

Pooley v. Harradine, 7 El. & Bl. 431 ;

Greenough v. McClelland (Ex. Ch.) 30 L. J. Q. B. 15.

Pollock, C.B.—This rule should be discharged. The usual rule of Law, and I believe of Equity, is, that the creditor is not bound to use his rights against the principal, provided he does not tie his own hands up, so as to stop his right of suing the principal, and therefore the sureties' right also. That is not done here, so the sureties are not discharged.

BRAMWELL, B.—I am of the same opinion. There are no terms of obligation even in these rules, but only a statement of the duties of the committee.

CHANNELL, B.—I agree. I do not dispute *Pooley v. Harradine*, but the defendants here do not show an original contract that they shall only be sued in a certain case.

PIGOTT, B., concurred.

Rule discharged.

Ex. } SCOTT v. THE LONDON DOCK
11 Nov. 1864. } COMPANY.

*Negligence—Dangerous Place—Injury to Public
Officer in Execution of his Duty—Obligation
towards Licensee—Happening of Accident—
Evidence of Negligence.*

The plaintiff, a custom-house officer, in the execution of his duty, was lawfully in the London Docks, when some bags of sugar fell on him from the defendants' warehouse and injured him :—

Held, *per CHANNELL and PIGOTT BB.* (dubitante *POLLOCK, C.B.*, and dissentiente *MARTIN, B.*), that there was sufficient *prima facie* evidence of negligence for the jury to cast on the defendants the onus of proving that the accident was not caused by their negligence.

This was an action on the case for negligence.

The plaintiff was a surveyor and officer of the customs, and went in the execution of his duty to a certain quay in the London Docks. It was admitted that he was lawfully there. As he was passing from one doorway to another he was felled to the ground by six bags of sugar falling upon him from a warehouse belonging to the defendants, no one calling out to stop him.

For the injury so sustained he brought his action, which was tried before *Martin, B.* At the close of the plaintiff's case the learned Judge directed a nonsuit, on the ground that there was no evidence of negligence.

The Solicitor-General, this term, obtained a rule *nisi* to set aside the nonsuit, and for a new trial on the ground that there was evidence of negligence.

Murphy (*Bovill, Q.C.*, with him), now showed cause against the rule.

This rule was obtained on the authority of *Byrne v. Boadle*, 2 H. & C. 722 ; 3 N. R. 162. Even if this case is law and otherwise parallel, still as the London Docks was a place where the plaintiff was only as a licensee, he was only entitled not to be treated as a trespasser, and had no other rights, except that no trap should be laid which might lead him into danger,

Bolsh v. Smith, 7 H. & N. 736.

In *Byrne v. Boodle* the plaintiff was in a public highway.

[MARTIN, B.—What distinction is there between a licence to be in a highway, and a licence to be in the Docks?]

[POLLOCK, C.B.—I suppose the distinction may be illustrated by the case of a railway station, where a man may lawfully be, but he must not wander about into dangerous places. The company must allow nothing dangerous over the doorways.]

Yes,

Cornman v. The Eastern Counties' Railway Company, 4 H. & N. 881, decides that. In *Byrne v. Boodle* the plaintiff had a right; here he had only a licence.

[MARTIN, B.—Has he not a right by Act of Parliament to be in the Docks?]

I find no Act which says so. A different degree of negligence is required in the case of an accident happening in a highway, and one happening in a private place to a licensee. Proximity to a highway is made a ground for requiring more care,

Hounsell v. Smyth, 7 C. B. (N. S.) 731.

It lay on the plaintiff to show negligence. Contributory negligence is properly considered in the direction of a nonsuit,

Wilkinson v. Fairrie, 32 L. J. Ex. 73.

Byrne v. Boodle only decides there may be circumstances in which the happening of an accident is evidence of negligence,

Hammack v. White, 31 L. J. C. P. 129.

There may have been contributory negligence here, and the plaintiff's evidence should have shown that there could not have been.

He also cited,

Cotton v. Wood, 29 L. J. C. P. 333.

The Solicitor-General (Jones with him), in support of the rule.

Byrne v. Boodle is not distinguishable from this case.

He also cited,

Carpue v. The London and Brighton Railway Company, 5 Q. B. 747.

He was then stopped.

POLLOCK, C.B.—I have considerable doubts in the case; but I shall not oppose the rule being made absolute, subject to an appeal.

MARTIN, B.—I think this rule ought to be discharged, on the authority of *Hammack v. White*. If the Court above think the evidence on my note *prima facie* sufficient, they will affirm the judgment of the majority of this Court.

CHANNELL, B.—I think this rule should be made absolute. I cannot, in substance, distinguish this case from *Byrne v. Boodle*. I assume that the plaintiff was rightly and lawfully in the Docks.

PIGOTT, B.—I think the rule should be made absolute. I also assume that the plaintiff was lawfully in the Docks, and not merely as a licensee. As to the evidence, "*res ipsa loquitur*," and the defendants should have been called on to explain the accident, to show that there was no negligence of theirs. If the facts had been evenly balanced, so as to leave it doubtful, whether the cause was pure accident or negligence, I think the nonsuit would have been right. But it must be presumed, that where ordinary care is taken, an extraordinary accident will not happen.

Rule absolute.

Ex. } How v. GREEK.
14 Nov. 1864.

Lease by Tenant for Life and Reversioner—Reversioner not executing—Covenants binding on Lessee.

Lease by tenant for life and reversioner according to their respective interests, to the defendant of premises for fourteen years. Reversioner alone does not execute the deed, but the defendant enters under the lease:—

Held, that the defendant's covenants in the lease with the tenant for life are nevertheless binding.

Declaration for breach of covenants in a farming lease, setting out the lease, whereby the plaintiff and one Yeo (so far only as they legally could or might, according only to their respective estates and interests) demised to the defendant a farm and premises therein described, for a term of fourteen years, from the 25th of March, 1851, the lease containing the usual covenants on the part of the defendant with the plaintiff. Allegation that the defendant entered under the lease, and averment of breaches of covenant.

Second plea: that at the time of the execution of the said deed the plaintiff was possessed of the said premises, for the residue of a term of years, in case the plaintiff should so long live, and was not seised or possessed of, or entitled to, any other estate or interest therein; and the reversion of the said premises after the expiration of the said estate of the plaintiff then was, and has since been, vested in the said Yeo; and that the indenture of lease was never signed, sealed, or delivered, by the said Yeo . . .; and that there never was any consideration or value for the signing, sealing, and delivery of the said indenture, or of the defendant's part of the same, and the defendant's alleged covenants were void and of no effect.

Demurrer to this plea, and joinder in demurrer.

J. C. Mathew, for the plaintiff, argued that the plea was bad, as the covenants of the defendant with the plaintiff were referable to the distinct estate conveyed by the plaintiff. The plaintiff could not have brought ejectment, so that as to his interest the lease was binding.

Alfred Wills, in support of the plea, argued that the reversioner's not executing rendered the covenants void, as the defendant never got his indefeasible term of fourteen years. The tenant does not get what he expected. The covenants attach to the term, and the term fails. He cited,

Swatman v. Ambler, 8 Exch. 72 ;

Pitman v. Woodbury, 3 Exch. 4.

POLLOCK, C.B. — We are all of opinion that our judgment should be for the plaintiff. The plaintiff has done all he can, but has entered into no bargain as to the reversion. Perhaps the lessee was to obtain the reversioner's signature. Perhaps the reversioner was never applied to. The tenant for life and the rever-

sioner separately agreed to grant a lease, and the instrument was prepared by which they give the lease according to their respective interests. The plaintiff is fully entitled to the benefit of the defendant's covenants.

BRAMWELL, B.—I am of the same opinion. It may be, that the defendant might have refused the lease unless the reversioner would execute. But he did not refuse, but entered.

CHANNELL, B.—I agree. I wish to point out that the estate of the plaintiff is still a continuing interest.

Judgment for the plaintiff.

EQUITY.

Lord Chancellor. }
16 Nov. 1864. } *Re SKINNER.*

Bankruptcy—Trust Deed—Registration—Extension of Time—General Order of 22nd May, 1862—Form of Account.

The Court of Bankruptcy has no power to order a deed to be registered under the 192nd section of the Bankruptcy Act, 1861, after twenty-eight days have elapsed since the execution by the debtor.

Each sheet of the account required by the General Order of the 22nd of May, 1862, must be marked as an exhibit to the verifying affidavit.

This was an application for leave to register a trust deed, executed under the 192nd section of the Bankruptcy Act, 1861, notwithstanding that more than twenty-eight days had elapsed since its execution by the debtor.

The account which under the General Order of the 22nd of May, 1862, was delivered together with the deed extended over two sheets, but the first of such sheets only was marked as an exhibit to the verifying affidavit. The total amount of debts was, however, stated on this sheet, and it was equal to the sum of the debts set out in the two sheets, and the numbers against the creditors' names progressed regularly through the two sheets.

Registration of the deed was refused, and the affidavit was accordingly re-sworn so as to make both the sheets exhibits, but the twenty-eight days specified in the 192nd section having elapsed before this could be done, an application was made to the Court of Bankruptcy to allow the deed to be registered, which was refused.

Against this decision the debtor and the trustee under the deed now appealed.

Russell, in support of the application.

The 194th section gives the Court the power of allowing registration after the twenty-eight days have expired,

Wishart v. Fowler, 3 N. R. 373.

THE LORD CHANCELLOR, who in the course of the argument, had intimated that the registration had been properly refused, said, that he had no power to order registration under the 192nd section. The 194th section applied only to deeds not intended to bind a dissentient minority. He would grant an order to register under that section, if the appellant desired it.

Lord Chancellor. }
15, 17 Nov. 1864. } *TROUP v. RICARDO.*

Pleading—Demurrer—Multifariousness—Right of Insolvent Debtor to Sue without obtaining Revesting Order—Bankruptcy Act, 1861, ss. 1, 24.

The property of A, an insolvent debtor, was put up for sale under the insolvency, subject to a mortgage to B. The property was bought by C, who paid off B's mortgage and took a conveyance of the property. It being alleged that the sale was fraudulent, and that B had, by collusion with the assignee in insolvency, been allowed to establish a claim for a much larger sum than was really due to him on the mortgage:—

Held, on demurrer, that a bill by A to which B and C were defendants, and seeking that the rights of B under his mortgage might be ascertained, and that the sale to C might be set aside, was not multifarious.

An insolvent debtor, all claims against whom have been satisfied, but who has not obtained a revesting order from the Court of Insolvency, may be plaintiff in a suit involving issues which that Court would be incompetent to try,—if he cannot obtain the revesting order, except upon terms which would be destructive of his equity.

Semble, under the Bankruptcy Act, 1861, there is jurisdiction in the Commissioners of Bankruptcy in respect of matters arising anew out of old insolvencies.

This was an appeal from a decision of the Master of the Rolls (reported 4 N. R. 475), allowing a demurrer to the plaintiff's bill.

The bill contained many irrelevant statements which it was stated at the bar had been introduced by the plaintiff himself after the bill had been signed by counsel; but the averments upon which the Lord Chancellor relied in his judgment may be briefly summed up as follows.—

Previously to the year 1853 the plaintiff was the owner of freehold and leasehold property of great value at Hastings, subject only to a mortgage to the defendant Ricardo.

In 1853 a petition was filed against the plaintiff in the Insolvency Court, and an order was made by that Court on the 21st of October, 1853, vesting all the property of the plaintiff in the defendant Sturgis as the assignee under the insolvency.

Subsequent to October, 1853, Ricardo instituted proceedings in Chancery for the purpose of recovering the sum due to him on the above-mentioned mortgage; and, as was alleged, was enabled by collusion with

Sturgis, to establish a claim to a much greater sum than was actually owing to him.

In 1855, under the insolvency, the property at Hastings was put up for sale by auction, subject to Ricardo's mortgage; and the defendant Moreing was declared the purchaser thereof.

It was alleged that this purchase was in reality made in pursuance of an agreement between and for the benefit of the defendants, Moreing, Holgate, Day and Tweed, the latter of whom acted as solicitor to the assignees in the insolvency, and had the conduct of the sale. It was also alleged that, in carrying out the sale, Tweed acted in collusion with Ricardo and the other defendants, and was guilty of gross misconduct: the result being that the property was sold at little more than a nominal value. Subsequently to the sale, Ricardo's debt was paid off by Moreing, Holgate, Day and Tweed, or some of them; and the property was conveyed to Moreing alone, free from the mortgage debt.

The plaintiff's creditors had all been paid in full; and shortly before the abolition of the Insolvency Court, the Commissioner directed the sum of 850*l.*, then in Court, to be paid over to the plaintiff. Shortly afterwards the plaintiff applied to the Commissioner for an order annulling the insolvency; but the latter declined to make any such order, unless the plaintiff would sign an undertaking confirming the acts of the defendants, which were complained of. The plaintiff refused to give such undertaking, and in June, 1864, filed this bill, praying that the amount actually owing to Ricardo, or the defendants as claiming under him, by the plaintiff might be ascertained; that the sale of the Hastings property might be set aside; and for consequential relief.

Moreing and Holgate demurred for want of equity and multifariousness; and the demurrer was allowed. The plaintiff now appealed.

Selwyn, Q.C., and *T. A. Roberts*, for the appellant.

1st. As to the want of equity. It must be taken on the statements of the bill, that all the purposes of administration in the Insolvent Court, are now satisfied; there arises, therefore, a resulting trust as to the plaintiff's property, which brings the matter within the jurisdiction of the Court; and as no relief can now be had in the Insolvent Court, this is the proper tribunal to adjudicate on the matter,

Wearing v. Ellis, 6 De G. M. & G. 596.

2nd. As to the multifariousness. If the sale is set aside, the purchasers will be entitled to stand in the place of Ricardo, to the extent in which the plaintiff was indebted to him; but the amount of the debt cannot be ascertained without making Ricardo a party.

Baggallay, Q.C., and *Martineau*, for the demurrer.

1st. The plaintiff is precluded from seeking relief in this Court by the terms of the Insolvency Act, 1 & 2 Vict. c. 110. Under section 63 it was competent for the plaintiff to complain to the Commissioners in

respect of any misconduct on the part of the assignee. Again, section 44 prohibits an insolvent from bringing any action or suit against an assignee, after his discharge.

Grange v. Trickett, 2 El. & Bl. 395;

Kernott v. Pittis, 2 El. & Bl. 406,

were referred to.

2nd. The plaintiff has no *locus standi* here till he has obtained a revesting order, under section 92. The plaintiff was refused an order annulling the insolvency, and therefore ought not now to be heard. It may be, however, that his application, though in accordance with the practice of the Court of Insolvency, was improper. The Commissioners of Insolvency held, that section 92 of 1 & 2 Vict. c. 110, applied only to cases where an adjudication had been made; and where there had been no adjudication (as was the plaintiff's case), their practice was to make an order annulling the insolvency upon the insolvent undertaking to confirm all the proceedings which had taken place. But it has been decided that section 92 extends to cases where no adjudication had been made,

Tudway v. Jones, 1 K. & J. 691;

the plaintiff ought therefore to make application for a revesting order to the London Commissioners of Bankruptcy, who have jurisdiction in this matter, under section 1 of the Bankruptcy Act of 1861. The case does not fall within the "pending" business reserved to the Commissioners of Insolvency by section 24 of the Act of 1861,

Anon. 5 L. T. (N.S.) 403;

but if it does, then the plaintiff has lost the opportunity of obtaining a proper order by his own neglect, for he allows seven years to pass without making an application to that Court.

They also referred to,

Rochfort v. Battersby, 2 H. of L. Ca. 388;

Dyson v. Hornby, 7 De G. M. & G. 1.

3rd. Even admitting a revesting order to be unnecessary, such delay on the part of the plaintiff is apparent on the face of the bill as is a valid ground of demurrer.

4th. The statements upon which relief is asked are not sufficiently precise,

Wormald v. Delisle, 3 Beav. 18.

5th. The bill is multifarious, inasmuch as the transaction with Ricardo is perfectly distinct from the sale. For the purpose of setting aside the sale, which was made subject to the mortgage, Ricardo is a perfectly unnecessary party.

A reply was not called for.

THE LORD CHANCELLOR said, that the case stated in the bill, if established at the hearing, would entitle the plaintiff, supposing him to have a *locus standi*, to a decree to have the sale set aside, and also to prosecute an inquiry into the true right of Ricardo; because the demurring defendants, being the assignees of Ricardo's interest, would have the right, even if the

sale were set aside, to stand in his place. Complete justice could not therefore be done, without dealing first with the question of the sale, and then with the question, what was the true extent of Ricardo's claim against the plaintiff, and what therefore the latter ought to be put to pay to the purchaser,—who, if the sale were set aside, would be a mortgagee only to the extent of the sum found justly due to Ricardo. The various defendants were therefore sufficiently connected together by the allegations made against them to prevent the demurrer for multifariousness being allowed.

Although the bill contained much matter of an improper nature, which might furnish reasonable ground for complaining of the impertinence of the bill, or for, what was a better mode of proceeding, dealing with the costs to be allowed the plaintiff at the hearing, yet the impertinent matter did not render that which was pertinent so obscure, so indefinite, or so uncertain, that he could refuse to recognise a just subject of complaint in the bill; its allegations being taken as admitted. In the bill there was sufficient to justify a decree in favour of the plaintiff, if the allegations turned out to be warranted by the evidence adduced at the hearing.

Having thus disposed of these secondary questions, he came to that which had been the main subject of the argument,—viz., whether the plaintiff had a *locus standi* in the Court. Now, it was alleged, and must be taken to be true, that a large surplus had remained after all the purposes of administration in the Insolvent Debtors' Court had been answered and satisfied. The bill, therefore, so far as regarded the primary purpose of the interference of the Insolvent Debtors' Court, in effect, raised a case which showed that that Court had no longer any duty to discharge. The rest of the case showed that the plaintiff was entitled to his surplus property, and also raised an issue between him and his assignees, which the Court of Insolvency (even if it were now in existence) was quite incompetent to try; and not only so, but the forms of that tribunal altogether precluded the defendant from insisting that the plaintiff ought first to have recourse to it; and obtain a revesting order, or an order for the assignee to account to him for the surplus property.

In the first place, the issue raised by the plaintiff, that the assignees had fraudulently made away with his property at an undervalue, could not be tried by the Insolvent Debtors' Court, because it would be necessary that the purchaser, a party to the fraud, should be present upon the trial for the purpose of restitution; but the Insolvent Debtors' Court had no authority to bring the purchaser before it.

Again, if it were said that the plaintiff must get an order from that Court to restore him the surplus of his property, either such order would in express terms be destructive of the plaintiff's right, or the plaintiff would not be allowed to get it, except on an account being taken and passed,—which account would include, as a legitimate transaction by the assignee, the very

fraudulent transactions complained of by the bill. To tell the plaintiff, therefore, that he must get this order from a Court incompetent to try the issue raised, was to deny him justice: for in order to obtain it, he would have to submit to terms which would effectually prevent him from having the power of trying the question in this Court, or any other Court of competent jurisdiction.

Now the duty of the Insolvent Debtors' Court was discharged when all the debts and claims were satisfied. It followed from the principles of Equity, that the surplus property remaining undistributed, and no longer required for any function of that Court, fell under the general rule of law, which raised on the part of the legal owner of property, no longer required for the purposes of the conveyance to him, an obligation to restore that which was not wanted to the original owner, from whom it had been taken for a limited purpose. It was clear, therefore, that the surplus of the insolvent's property was subject to the law of resulting trusts: and though in an ordinary case it might be thought fit that the surplus should be conclusively ascertained by means of an account taken by the Insolvency Court, which would at the same time require for its officer a proper discharge on the part of the insolvent, yet, where a complaint was made against the officer of the Court of such a nature that the Court had no jurisdiction to try it, it followed from the infirmity of the particular jurisdiction that it would be a denial of justice to impose on the insolvent the taking of an account which would involve a discharge to the officer of the Court from that very complaint, which the Court had no power to try. In such a case as that, this Court would exercise that universal jurisdiction which it had in all cases of fraud and resulting trust. The moment a case arose which a special jurisdiction had not authority to try, that special jurisdiction ceased, and the power delegated to it for a limited purpose could no longer be invoked to bar the right of another Court of universal jurisdiction to interfere for the purposes of justice. Abundant confirmation, if any were wanted, of principles so plain as those just stated was to be found in the case of *Wearing v. Ellis* (*loc. cit.*).

He would have held, therefore, that the plaintiff was relieved from the necessity of going to the Insolvent Debtors' Court, even if that Court had remained in all its integrity and power. But by the Bankruptcy Act of 1861, the jurisdiction exercised by the Commissioners of Insolvency was transferred to the Commissioners of the Court of Bankruptcy, but only for the purposes of that Act. Besides that, there was retained in the Commissioners of Insolvency for a short period a limited jurisdiction and authority confined to matters pending at the time of the passing of the Act, and enabling the Commissioners to bring parties before them with a view to wind up the business which remained to be done. That jurisdiction was made

determinable by the Lord Chancellor, and had accordingly been finally brought to an end by an order made by him anterior to the filing of this bill. There might be, and probably was, still a right to resort to the Commissioners of Bankruptcy for the purpose of exercising the necessary jurisdiction in respect of all matters emerging and arising anew out of antecedent insolvencies. Thus (and this case he gave merely as an example, without intending to limit the powers of the Commissioners of Bankruptcy), in an old insolvency apparently wound up, if some new property were discovered, or if some new information were obtained by which it would appear that the creditors might, in the name of the Insolvent Court, recover some large property, the Commissioners of Bankruptcy would have power to appoint an assignee in the insolvency, and to give such directions as might be necessary for the prosecution of such a right. But he was of opinion that they would not have power to make an order at the instance of the plaintiff, and if they had any such powers they would have it on the same terms, and subject to the conditions, and bounded by the same restrictions and limits, as it was previously held and possessed by the Commissioners of Insolvency. An application to the Bankruptcy Court would therefore subject the plaintiff to the same necessity of coming under terms destructive of his rights as would have accompanied him had he applied to the Insolvent Debtors' Court.

It was said, however, that the plaintiff did make the application, and that the matter must be treated as *res judicata*. But it was plain that what the plaintiff did was merely to apply to the Commissioner *ex parte*, and that the other side were not convened or cited for the purpose. The matter was, therefore, not *res judicata*; for that could only be between parties duly convened on an issue properly raised and rightly decided.

The case must not be confounded with those of *Rockfort v. Battersby* (*loc. cit.*), or *Dyson v. Hornby* (*loc. cit.*), the principle of which was, that, pending the administration of the insolvent's estate in the Insolvent Debtors' Court, this Court would not interfere with the assignee in any matter relating to the administration. The difference lay between the refusal of the Court to interfere pending administration in another Court, and the right and duty of the Court to interfere when the administration in that Court had ceased: and here not only had the administration ceased, but also the functions of the Court itself; and the limited authority which remained was unequal to the decision of the matter,—and besides, could only be exercised on terms which would be wholly destructive of the plaintiff's equity.

The demurrer would, therefore, be overruled; but without costs, as the matter, added to the bill, rendered it very difficult to tell what was the definite case made. The plaintiff must know that the loss of his costs was entirely attributable to his own injudicious and improper interference in the matter.

Lord Chancellor. } WENTWORTH v. LLOYD.
17 Nov. 1864.

*Practice—Order of House of Lords made
Order of Court of Chancery.*

Upon an ex parte application, an order of the House of Lords, dismissing an appeal from the Court of Chancery with costs, to be taxed by the Clerk of Parliament, was made an order of Court.

In this suit the bill was dismissed with costs by his Honour the Master of the Rolls. On appeal, the House of Lords affirmed his Honour's decision, and dismissed the appeal with costs, to be taxed by the Clerk of Parliament. The costs were taxed accordingly, but payment could not be enforced as the House of Lords was not sitting.

Sir Hugh Cairns, Q.C., and Pemberton, now moved ex parte, that the order of the House of Lords might be made an order of this Court, referring to

*Attorney-General v. Scott, 1 Ves. 418 ;
Mann v. Ricketts, 3 De G. & Sm. 446 ;
Seton on Decrees, 1160.*

THE LORD CHANCELLOR made the order, observing that in such cases there was a difference between appeals from the Courts of Common Law and of the Court of Chancery. In appeals from Courts of Common Law the record was carried up to the House of Lords, and, after the appeal was disposed of, was sent back again; but in the Court of Chancery there was no record, and, the ministerial act of the Court was probably requisite in order to make the order of the House of Lords an order of this Court. It must not, however, be supposed that the jurisdiction of the House of Lords was in any way interfered with.

Lord Chancellor. } BLASSON v. BLASSON.
11, 21 Nov. 1864.

*Will, Construction—Children en ventre—
"Born and Living."*

The fiction of law by which a child en ventre sa mère is treated as actually born, applies only for the purpose of enabling him to take a benefit.

Where, therefore, in a will a trust to accumulate until the youngest of the children of A, B, and C, who should have been born and living at the testatrix's decease, should attain twenty-one, was followed by a bequest of the accumulated fund to a different class of children:—

Held, that, for the purpose of ascertaining the period of distribution, the word "born" must be interpreted in its natural and not its fictitious legal sense.

This was an appeal from a decision of Vice-Chancellor Kindersley, reported 3 N. R. 407.

Sarah Bladdon, by her will, gave stock to trustees upon trust, to accumulate the dividends thereof, and when and so soon as the youngest of the children of her nephew and two nieces therein named, who should have been born and living at the time of her decease, should arrive at the age of twenty-one years, then to divide the stock with its accumulations among all such children of her nephew and nieces as should be then living.

Of the children of the nephew and nieces now living some were born before the testatrix's death, two were *en ventre* at that time, and others had been begotten subsequently. All the children actually born before the testatrix's death had attained twenty-one, but the children then *en ventre* were still infants.

The Vice-Chancellor decided that the accumulation ought to continue until the youngest of the children *en ventre* attained twenty-one, and that the fund would then be divisible among all the children of the nephew and nieces then living.

Glasse, Q.C., Cadman Jones, and Grenside, for the appellants, the children born before the testatrix's death, contended,

1st. That the words "children who shall have been born and living," did not include children *en ventre*.

2nd. That the words "such children" in the trust for division, referred to the class of children mentioned in the previous clause; and that, therefore, the children born subsequently to the testatrix's death were not entitled to share.

THE LORD CHANCELLOR at the conclusion of their argument, expressed an opinion that the fund was divisible among all the children of the nephew and nieces living at the period of distribution.

Baily, Q.C., and Humphrey, for the children *en ventre* at the testatrix's death, and *Toller, Q.C., and Herbert Smith*, for the children begotten after the testatrix's death, said that if his Lordship was of that opinion, it was for their interest as well as for that of the appellants, to contend that the class of children in the direction to accumulate did not include children *en ventre*.

The arguments against children *en ventre* being included, were as follows.—

The only case in which children *en ventre* had been held to be included under the words, "children born" was,

Trower v. Butts, 1 Sim. & Stu. 181;

That case was in fact founded on a misconception of

Whitelock v. Heddon, 1 Bos. & Pul. 243,

where the devise was to such male issue as John Whitelock shall have at the time of John Heddon attaining twenty-one, the words "begotten and born" only occurring in a condition annexed to the devise, and which was clearly fulfilled.

The other case relied upon by Sir John Leach,

Doe d. Lancashire v. Lancashire, 5 T. R. 49,

a decision that the birth of a posthumous child revoked a will made before marriage, only furnished a remote analogy.

In *Bennett v. Honywood*, Amb. 708,

Lord Apsley considered that the rule as to admissibility of children *en ventre* only applied to *devises* to children, and not to a devise to relations.

The use of the two words "born" and "living" in the present instance seemed to show that the testatrix intended to distinguish between them.

The rule that a child *en ventre sa mère* was to be considered as born, applied only, where it would be for the child's benefit,

Swinburne, pt. 4, sect. 15, vol. ii. p. 562, (7th ed.);

Millar v. Turner, 1 Ves. 85;

Wallis v. Hodson, 2 Atk. 114.

Hinde Palmer, Q.C., and Gill, for the trustees, stated that both the nieces were dead, and that it was highly improbable that the nephew would have any more children, and they declined to argue against the immediate division of the fund.

21 Nov. 1864.

THE LORD CHANCELLOR.—In *Trower v. Butts*, a case determined by Sir John Leach in 1823, it was decided, that a bequest of personalty in trust for all the children of the testatrix's nephew born in the lifetime of the testatrix, included a child of which the wife of the nephew was *enceinte* at the death of the testatrix, although not born until several months after such decease. In the present case some doubt was expressed by the Vice-Chancellor as to the correctness of that decision. But in his Lordship's opinion the judgment of Sir John Leach was right, and well warranted by antecedent decisions in our law. The same rule prevailed in other systems of jurisprudence. In the Digest, Book I, title 5 De Statu Hominum, sect. 7, it was said, "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partús quæritur, quantum alii, antequam nascatur, nequaquam prosit." And again, in section 26, it was said, "Qui in utero sunt in toto pæne jure civili intelliguntur in rerum naturâ esse."

It was, however, material to observe that the fiction or indulgence of the law, which treated the unborn child as actually born, applied only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to; and that it was limited to cases where "de commodis ipsius partús quæritur."

This was well expressed by John Voët in his Commentary on the title of the Digest just cited. Speaking of the "nascituri," his words were, "Fictione tamen juris pro jam natis habentur, quoties de ipsorum commodo agitur," and again, "Quod si non ipsorum in utero existentium sed tertii tantum verta-

tur commodum, cessat illa juris fictio, quæ pro jam natis haberentur, nec aliis prosunt, nisi nati."

That distinction supplied the ground for the decision of the present case. Reference had been made by the testatrix to the time when the youngest of the children of her three nephews and nieces, who should be born and living at the time of her decease, might arrive at the age of twenty-one years, and that reference was made for the purpose of putting an end, on that event, to a trust for accumulation, and the words were, therefore, descriptive only of a natural event,—namely, the coming of age of the youngest of the children who were born and living at the death of the testatrix; in which description the word "born" must have its natural and not its fictitious legal interpretation.

It was indeed true that in the present singular instance the class of children to take under the gift might be augmented in number by holding that the words, "who shall have been born and living at the time of my decease," included children then *in utero*; but that would not be warranted by the principle of this peculiar rule of construction, which was limited to cases where such construction of the word "born" was necessary for the benefit of the unborn child, and no such necessity here arose. Inasmuch, therefore, as the words in question were used for the purpose only of ascertaining a period of time, and were not a description of children as objects of a bequest or trust, he was of opinion that the words "born and living at the time of my decease" did not include children *in utero*, and that the trust for accumulation ceased when the youngest of the children actually born and living at the death of the testatrix attained majority. For those reasons he reversed that part of the judgment of the Vice-Chancellor.

On the other point, his Lordship agreed with his Honour. The period of division was the time when the youngest of the children actually born at the death of the testatrix attained majority, and the stock and accumulations were directed to be divided among all such children of her nephew and nieces as should be then living, viz., at the period of division; and as there was nothing to restrict or limit those words of description, all the children born after the death of the testatrix, but before the period of division, were entitled, if living at that period. The order of the Vice-Chancellor must be varied accordingly.

Lords Justices. } *Re WAT'S TRUSTS.*
17 JULY, 1864.

Voluntary Settlement—Assignment of Equitable Reversion—Notice to Trustees.

On a voluntary assignment of an equitable reversion, there being no power in the assignor to deal with the legal interest, notice to the trustees is not necessary to the validity of the assignment.

An unmarried woman, the owner, subject to a settlement, of a reversionary equitable interest in a sum of stock, assigned it by deed to volunteers. No one except her solicitor, who was also the solicitor to the trustees of the settlement, was informed of the assignment. She kept the deed in her possession, and afterwards destroyed it, and subsequently dealt with the fund by will:—

Held, that the assignees were entitled to the fund as against the beneficiaries under the will.

This was an appeal by the Attorney-General from an order made by the Master of the Rolls, on a petition for a declaration and payment of a fund out of Court.

By a voluntary deed, dated the 11th of May, 1852, Lady Catherine Cholmeley assigned her reversionary interest in the fund in question, then vested in trustees under a settlement, to trustees on certain charitable trusts.

Lady Catherine retained this deed in her own possession, and its existence was never communicated either to the trustees of the deed, of the settlement, or for the charity. Previous to her death, Lady Catherine destroyed the deed, under the impression that she thereby acquired power to dispose of her interest in the fund by her will. By her codicil dated the 2nd of March, 1857, she bequeathed her interest in the fund to the children of her late brother.

The case is reported 4 N. R. 453, where the facts are sufficiently stated.

The Attorney-General and T. H. Terrell, for the Attorney-General, contended that this was a complete assignment. There was nothing left undone by the assignor which was necessary and possible to be done. The fund was vested in the trustees of the former settlement, and Lady Cholmeley had no right, during the life-time of the tenant-for-life, to require any alteration in their possession. As to notice to the trustees, this might be necessary as against a subsequent assignee for value without notice, but was wholly unnecessary as against the assignor or volunteers claiming under her; besides, notice could be given at any time, and by any person; it was no more the part of the assignor to give notice than any other indifferent person; and notice was sufficiently given by the fact of the claims being made in Court.

They cited,

Loveridge v. Cooper, 3 Russ. 30, 48;
Sloane v. Cadogan, Sug. V. & P. 1119 (11th ed.);
Fortescue v. Barnett, 3 Myl. & K. 36;
Blakely v. Brady, 2 Dr. & Wal. 311;
Meek v. Kettlewell, 1 Hare, 464; 1 Ph. 342;
Ekewich v. Manning, 1 De G. M. & G. 176;
Donaldson v. Donaldson, Kay, 711.

They commented upon

Bridge v. Bridge, 16 Beav. 315;
Beech v. Kemp, 18 Beav. 235.

Next, the evidence of the execution of the deed by Lady Cholmeley is satisfactory, and the circumstance that she kept the deed in her possession does not create any difficulty,

Fletcher v. Fletcher, 4 Hare, 67.

Hobhouse, Q.C., and *W. W. Karlake*, for the beneficiaries under Lady Cholmeley's will, contended that the circumstances of the case showed that the transaction was incomplete, and that the settlor intended it to be so, and that the fact of her keeping the deed in her possession, not communicating its contents to the trustees, or any one else, and afterwards destroying it, proved that her intention from the beginning was to retain a power of revocation; and the solicitor ought to have told her that such a power could have been inserted in the deed. They cited,

Naldred v. Gilham, 1 P. W. 576;

King v. Cotton, 2 P. W. 257;

Hope v. Harman, 11 Jur. 1097;

Doe d. Garnons v. Knight, 5 B. & C. 671;

Boughton v. Boughton, 1 Atk. 625;

Cecil v. Butcher, 2 Jac. & W. 565;

Phillipson v. Kerry, 32 Beav. 628;

Uniacke v. Giles, 2 Moll. 257;

Nannev v. Williams, 22 Beav. 452.

H. F. Bridlowe, Bird, S. Thompson, F. O. Haynes, and Nugent, appeared for various parties.

The Attorney-General, in reply, cited,
Forshaw v. Welsby, 30 Beav. 243.

Knight Bruce, L.J., said that, on the evidence before the Court, he did not think that there could be any doubt as to the validity of the deed: neither the circumstance of the deed containing no power of revocation, nor any other circumstance, showed any unfairness in the transaction, or that the settlor was in any way ignorant of the contents of the settlement. It might be, that, if a bill were filed to set aside the deed, evidence could be furnished that the terms of the deed did not accord with Lady Cholmeley's intentions, and one of the three grounds of mistake, misapprehension, or bad advice, might be established, and thus a case be made for setting aside the deed, but on the evidence now adduced there was no such case. He thought that effect must be given to the deed, although notice was not given to the trustees, and that the order of the Master of the Rolls ought to be reversed, and an order made carrying out the provisions of the deed, but time should be allowed to the plaintiffs to file a bill to set aside the deed, if they should think proper to do so.

TURNER, L.J., said, that he was glad that this case had come before the Court, as he had long anticipated from what had been said in *Meek v. Kettlewell* (*loc. cit.*), that the question of the necessity of giving notice to trustees in a case such as the present would require a judicial decision. He was strongly of opinion that the want of notice did not affect the

validity of the deed; and was glad to find that the Vice-Chancellor Wood had taken the same view of the case in *Donaldson v. Donaldson* (*loc. cit.*).

Upon the true effect of the evidence there could be no doubt that the deed was validly executed by Lady Cholmeley, and must, therefore, be established. *Naldred v. Gilham* (*loc. cit.*) was a special case in its circumstances; *Cecil v. Butcher* (*loc. cit.*), and *Boughton v. Boughton* (*loc. cit.*) went upon entirely different grounds. He concurred with the Lord Justice as to the propriety of allowing the petitioners a short time to file a bill to set aside the settlement. Unless the petitioners should file such a bill within a fortnight, the order, at the expiration of that period, would be drawn up, in accordance with their Lordships' opinion.

Master of the Rolls. } BEST v. STONEHEWER.
19, 21 Nov. 1864.

Will, Construction—Descendant.

The word "descendants" in a will:—

Held, in the absence of any lineal descendants, to mean collateral descendants.

T. F. Grosvenor, by his will made in 1827, after giving life interests in part of his real estates to his wife, his sister Mrs. Brentnall, Mrs. Sparrow, and Mrs. Moreton, devised the same to G. N. Best upon trust to sell the same, and to pay the nett moneys arising from the sale, and any rents received between the death of the life tenants and the sale "unto such persons or person as shall at the time of the decease of the survivor of them my said dear wife, my sister, and the said Mrs. Sparrow and Mrs. Mary Moreton, be the nearest in blood to me as descendants from my great-grandfather, Mr. Joshua Stonehewer, heretofore of Leek aforesaid, and whose kindred with me originates from him, as well females as males, and whether from females or males, if more than one in equal degree, then in equal shares and proportions, but if only one, then to such only one and to their his or her heirs and assigns." There were also bequests to Thomas Stonehewer and his sister, and to G. N. Best, but no gift was made to the issue of the testator or his sister; and at the date of the will, in consequence of the testator being sixty-seven, his wife forty-six, and his sister seventy years of age, it was improbable that either the testator or his sister should have any issue. The testator died in 1831 without issue, his sister Mrs. Brentnall being his heir-at-law. Mrs. Brentnall died in 1843 without issue, having by her will dated in 1838 devised all her property, real and personal, to G. N. Best, and appointed him her executor. The plaintiff was the devisee and executor of G. N. Best, and also his heir-at-law. The testator's widow survived the other life tenants, and died in August, 1863. At the date of the will the testator and his sister were

the only lineal descendants of J. Stonehewer, and consequently at the death of the testator's widow, the survivor of the tenants for life, there was no lineal descendant of J. Stonehewer in existence. The plaintiff therefore claimed to be beneficially entitled to the real estates devised by the testator, contending that the trust had determined. Three of the defendants claimed as great-grandchildren, and one as great-great-grandchild of Thomas Stonehewer, the brother of J. Stonehewer, to be entitled to the benefit of the trust. One of the defendants, who was also a great-great-grandchild of Thomas Stonehewer, disclaimed. There were other persons who claimed to be entitled as collateral descendants of J. Stonehewer, but they were not made parties to the suit.

The suit now came on, on motion for decree.

Selwyn, Q.C., and *C. Hall*, for the plaintiff, contended that the words of the will meant lineal descendants. That was the natural meaning of the word "descendants" when not limited by the word "collateral,"

Crossley v. Clare, 3 Swan. 320; Amb. 897;

Oddie v. Woodford, 3 Myl. & Cr. 584.

The addition of the word "collateral" was excluded in the present case by the words "whose kindred with me originated from him."

Southgate, Q.C., and *H. Prendergast*, for the defendants, contended that "descendants" included collateral as well as lineal descendants,

Webster's Dictionary, "Descendant;"

Todd's Johnson's Dictionary, "Descent;"

Co. Litt. 10 b, 13 b, 237 a;

2 Black. Com. 201.

"Lineal Descendants" had been construed to mean blood relations in

Craik v. Lamb, 1 Coll. 489.

The testator meant to point to his nearest relations, and mentioned J. Stonehewer as the link between him and them.

Ince, for the defendant who had disclaimed, asked for his costs.

Selwyn, Q.C., in reply, observed, that on the defendants' contention, "descendant" would include the father as well as brother and nephew of the *propositus*.

THE MASTER OF THE ROLLS said, that this was a question of the construction of the words of a will, and chiefly of the word "descendants." There was at the date of the will no lineal descendant of J. Stonehewer except the testator and his sister, and it was highly improbable at that time that either of them would have any issue. The property of the testator was to go as directed in the clause of the will. The words there made use of could not mean lineal descendants, because after the decease of the testator and his sister without issue there could be no lineal descendants. The question was, whether the Court

could put any other fair and intelligible meaning on the words; for if not, there would then be an intestacy as respects the equitable interest in the property. It was common to speak of two kinds of descendants, lineal and collateral, and if "descendants" by itself meant only the former, the term lineal would be superfluous. It was also a common expression to speak of the transmission of an estate to one who was collaterally related to an intestate as a "descent." The definitions of "descent" in Coke on Littleton and Blackstone were borne out by that in Johnson's Dictionary; and unless the issue of an intestate's brother were called descendants of the intestate, there was no word to express the relation between them and the intestate in respect of their succession to his property; while, on the other hand, the expression collateral descendants would have no meaning. If the testator had used the expression collateral descendants, there would have been nothing in the will to throw any doubt on his meaning. He had used the word "descendants" only, and his great-grandfather had no lineal descendants; it might therefore be collected that he meant collateral descendants, and it would be too narrow a construction to say that he meant to exclude collaterals because that word was omitted, and it was certainly one which the Court would not adopt to create an intestacy. The expression "whose kindred with me originated from him," presented no difficulty, as it merely meant the persons through whom the testator's nearest relations were connected with the testator. There must be a declaration that "descendants" in the testator's will meant "collateral descendants."

As the defendant who had disclaimed was one step more remote than the three defendants who were great-grandchildren, he had clearly no right to the property, and need not have been made a party; and he was therefore entitled to his costs.

Kindersley, V.-C. } THE ALLIANCE BANK
10, 21 Nov. 1864. } (Limited) v. BROOM.

Demurrer—Creditor and Debtor—Promise—Specific Performance.

A creditor applied to his debtor to give security for a balance of account, and the debtor promised to give such security, but afterwards refused to fulfil his promise. The creditor filed a bill for specific performance:—

Held, on demurrer, that the implied forbearance of the creditor was a sufficient consideration for the promise.

This was the hearing of a demurrer for want of equity to a bill filed by a creditor against a debtor, to obtain specific performance by the debtor of a promise to give security for his debt, and for an injunction to restrain the defendants from parting with such securities.

The plaintiffs, the Alliance Bank (Limited) were a joint-stock banking company, having places of business at Liverpool and London; the defendants, Messrs. Broom, were merchants at Liverpool. The Alliance Bank had, from time to time, advanced moneys to the Messrs. Broom; and in September, 1864, there was a balance due from them to the bank of upwards of 22,000*l*. In that month the bank requested Messrs. Broom to give them security for the amount so due; and accordingly they, on the 19th of September, 1864, wrote to the manager of the bank a letter containing these words:

"We beg to hand you the following particulars of produce which we propose to hypothecate against our loan account; and at the same time undertake to pay the proceeds as we receive them to the credit of the same account."

This was followed by a list of the goods proposed to be so hypothecated.

This letter was delivered in person by W. T. Broom, one of the firm, who, at the same time, pointed out that some of these items had been sold, but the purchase-moneys had not then been received.

The bank, the next day (the 20th of September), applied to Messrs. Broom for the warrants for delivery of the goods mentioned in the above letter, who promised to deliver such warrants to the bank as soon as they could be obtained from the warehouses.

On the 23rd of September, the deputy manager of the bank went to the Messrs. Broom's office, and pressed for the names of the purchasers of such of the goods mentioned in the above letter as had been sold, and for the names of the warehouses in which all the goods therein mentioned were stored. The Messrs. Broom gave him the names of some of the warehouses, but said notices to the keepers of the warehouses would be useless, as they would not recognise any claims by persons other than the holders of warrants. On the 25th of September, the Messrs. Broom said they were advised not to hand over the warrants, and they subsequently refused to comply with the terms of the letter of the 19th of September.

The bank accordingly filed the present bill, praying that they might be declared entitled to a charge upon the several goods mentioned in the letter, and upon the proceeds of such of them as had been sold, for the amount due to them from the Messrs. Broom upon the loan account; and that the Messrs. Broom might be restrained by injunction from dealing with the goods in question, or with the proceeds of such of them as had been sold.

Daniel, Q.C., and *J. N. Higgins*, for the demurrer.

The letter does not constitute an agreement which the Court will execute. There is no consideration. The plaintiffs were in precisely the same position after the so-called agreement as before,

Smith on Contracts, 87;

Addison on Contracts, chap. 1. sect. 1;

Eastwood v. Kenyon, 11 Ad. & E. 450;

Thomas v. Thomas, 2 Q. B. 859;

Hopkins v. Logan, 5 M. & W. 241;

Kaye v. Dutton, 7 M. & Gr. 807.

Could such a contract be enforced, this case would be within the mischief of the Bills of Sales Act, 17 & 18 Vict. c. 36. If it is a rule that "the Court will not enforce the specific performance of a contract to sell mercantile goods," still less will it enforce a contract to mortgage them.

A mere agreement to deposit an article as a security does not constitute an equitable mortgage thereof,

Ex parte Coombe, 4 Mad. 249.

Bevir, for the bill.

The Bills of Sales Act does not apply between vendor and vendee. The existence of the debt at the time of the promise of the defendants furnished a sufficient consideration for such promise. He relied on

Twyne's Case, 3 Co. 80; 1 Smith's Leading Cases, 1.

Daniel, Q.C., in reply.

KINDERSLEY, V.-C., said that the defendants had put in a general demurrer to the bill, and maintained that the promise was without consideration, a *nudum pactum* which this Court would not enforce. They said,—the plaintiffs gave us no time in consideration for our promise, they did not undertake to abstain from suing us for a day. This was so; and the question was, was such consideration necessary? There was a demand by a creditor for security, and upon this, a promise by the debtor to give such security. When a creditor demanded payment, and in consequence his debtor agreed to give him certain security, although there was no promise on the part of the creditor to abstain from suing, yet the effect was, that the creditor gave in fact, and the debtor in fact received, a certain forbearance, not specified but still existing to some extent. If upon such an application the debtor refused to give the security required, the creditor would take immediate steps to enforce his demand. The debtor did then receive a certain amount of forbearance. It was true that the creditor might at any time proceed to enforce payment in spite of his debtor's promise; still the circumstances implied the receipt by the debtor of a certain amount of forbearance which he would not otherwise have received. The demurrer must be overruled with costs.

Stuart, V.-C.
17, 18, 19 Nov. 1864.

{ *SIMPSON v. THE SOUTH
STAFFORDSHIRE WATER-
WORKS COMPANY.*

*Injunction—Waterworks Act, 1847, 10 Vict.
c. 17, s. 12—Right to Take Water.*

A Waterworks Company proceeded under the incorporated provisions of the Waterworks Clauses Act, 1847, to sink a well and erect pumps on land, through

which their special Act only authorised them to carry an aqueduct:—

Held, that they were entitled to do so.

The Waterworks Clauses Act, 1847 (10 Vict. c. 17, s. 12), enacts that the undertakers entitled to the benefit of its provisions "may from time to time sink such wells or shafts, and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such buildings upon the lands and streams authorised to be taken by them as they shall think proper for supplying the inhabitants of the town or district within the prescribed limits with water."

The defendants, the South Staffordshire Waterworks Company, were empowered by their special Act, 27 & 28 Vict. c. lxxxix. s. 7 (1864), with which the Lands Clauses Acts and the Waterworks Clauses Acts, 1847 and 1863, were incorporated, to make and maintain the reservoirs, aqueducts, and other works therein described, in the line and situation, and on the levels, and upon the lands delineated on their deposited plans, and described in their books of reference, and defined on their sections, and to enter upon, take, purchase, and use such of the lands, streams, and waters mentioned in the plans and books of reference, as they might deem necessary for all or any of those purposes; and to take such water as they might require for the purposes of that and of their former special Acts and the incorporated Acts.

The works described included an aqueduct, which, according to the plans and sections, was to be constructed in tunnel, and to pass through a field belonging to the plaintiffs, and included in the book of reference. Only a small portion of the field would be wanted for the site of the aqueduct.

The company gave to the plaintiffs a notice to treat for the purchase of the whole field; but the plaintiffs, finding (as was admitted to be the case) that the company had found springs of water in the field, and intended to dig a well and erect permanent steam-pumping engines for the purpose of increasing their supply of water, obtained from Kindersley, V.-C., in the vacation, an interim injunction restraining the company from entering upon the field, except for the purpose of constructing the aqueduct. They now asked that the injunction might be made perpetual.

Greene, Q.C., and Haynes, for the plaintiffs.

The company can only compel us to sell our land for the purposes of the works described in their special Act. Any other use must be temporary. Their powers of deviation define the extent to which they may depart from that description. They have no power to erect pumping apparatus at all,

Webb v. The Manchester and Leeds Railway Company, 4 My. & Cr. 116;

Eversfield v. The Mid-Sussex Railway Company, 1 Giff. 153.

Malins, Q.C., and Speed, for the defendants.

We have an unqualified parliamentary power to take this land. The company is the sole judge whether it is or is not required for the purposes of the Act.

Our proposed works are intended to feed our reservoirs, and are necessary for that purpose. They are within our powers, and are included under the general term "works,"

Weld v. South-Western Railway Company, 32 Beav. 340;

Stockton and Darlington Railway Company v. Brown, 9 H. of L. Ca. 246;

Colther v. Midland Railway Company, 6 R. C. 779;

Richards v. Scarborough Public Market Company, 23 L. J. Ch. 110;

Wood v. Epsom and Leatherhead Railway Company, 2 L. T. (N. S.) 487.

At least we have a right to the temporary possession of the land, and an injunction would be premature.

Greene, Q.C., and Haynes, in reply.

"Purchase" and "take" mean the same thing, and there is no right under the Waterworks Clauses Act, 1847, to take water or erect machinery, except on land which the company are entitled to buy out and out. The railway cases do not apply.

STUART, V.-C., said that if the Court could look only to the defendant's special Act, there were, in his opinion, strong grounds for acting upon the view which appeared to have been taken by Vice-Chancellor Kindersley, and which, at the outset, had been his own. The scope of that Act appeared to be the construction of two aqueducts and two reservoirs, and for the purposes of their construction, to give a right to the company to enter upon, take, purchase, and use such of the lands marked on their plans as they might deem necessary. Looking at that Act alone, even though the whole field was delineated on the plan, the Court would not allow the company to take the field in an arbitrary manner for purposes not within the contemplation of the Act.

It seemed probable, in the present case, that at first the company had no intention of erecting the works complained of, and contemplated no more than the construction of the aqueduct and the temporary use of the other parts of the land. It appeared, however, to have occurred to the mind of the engineer that there might be springs of water in the land, which the company would be enabled to work under the parliamentary authority of the Waterworks Clauses Act, 1847. That Act carried the power of the company to enormous lengths. It was impossible to say that the company were not authorised to take every inch of the land in question: the words of the 7th section of the special Act were, "what they may deem necessary." It had been contended that the word "taken," in that section meant "purchase." He could not take that view, because in the

5th section, which referred to compensation, the word "take" was used in opposition to "purchase."

Upon the whole case, he would have been glad to have found grounds sufficient to allow him to decide in favour of the rights of private property against legislative interference, but the words of the Acts were too strong for him.

Wood, V.-C. }
18 Nov. 1864. } CLARKE v. CLARK.

Practice—Amendment of Bill—Discharge of Undertaking.

An order by which a motion for an injunction was turned into a motion for decree, and which contained provisions for expediting the hearing, also contained an undertaking by the defendant not to do a specified act until the hearing. The plaintiff having filed his affidavits, amended his bill under an order of course:—

Held, that the defendant ought to be discharged from his undertaking, but that the order to amend was not irregular.

This was a suit instituted by the owner of one of two adjoining houses, to restrain the tenant of the other house from erecting in his garden a photographic building, which interfered with the plaintiff's lights.

An application for an injunction having been made to Kindersley, V.-C., as vacation Judge, the following order was made by consent on the 6th of October, 1864—

"Let the motion be turned into a motion for decree. The plaintiff to file any further affidavits he may desire on or before the 29th instant. Affidavits of defendant in answer on or before the 8th of November. When set down, either party to be at liberty to apply to expedite the hearing.

"The defendant, until hearing, to undertake not to alter the line of construction of the buildings already erected by him, so as to increase the obstruction of light (if any) to the plaintiff's premises.

"To be without prejudice to any question in the cause."

By an order obtained by the plaintiff in Chambers on the 29th of October, the time for the plaintiff filing his affidavits was extended from the 29th of October until the 2nd of November, and the time for the defendant filing affidavits in answer from the 8th to the 12th of November.

On the 2nd of November the plaintiff, having filed his affidavits, obtained an order of course at the Rolls to amend his bill, and on the 7th of November, in pursuance of this order, he filed an amended bill. The amendment consisted in setting out certain deeds by which the pieces of land, upon which the plaintiff's and defendant's houses had subsequently been erected, were conveyed by the owners to different persons in fee simple, subject to fee-farm rents. Each of

these deeds contained covenants by the grantee to erect a house and offices according to a prescribed plan, not to erect any other buildings, and that no building should be erected which should be used for any trade or business except as therein mentioned.

All the facts stated by way of amendment had been previously stated in the affidavits filed on behalf of the plaintiff.

The plaintiff served notice of motion for decree on the 5th of November; but the defendant did not file any affidavits in answer, and the Clerk of Records and Writs refused to set down the cause to be heard, unless the defendant would waive his right to put in a voluntary answer.

T. H. Terrell, for the defendant, now moved that the order of Vice-Chancellor Kindersley and the undertaking thereby given by the defendant might be set aside and discharged; that the plaintiff might pay the costs of that motion; that the order to amend might be discharged with costs, and the amended bill taken off the file; and that the plaintiff might pay the costs of the present motion.

The order to amend had been irregularly obtained without mentioning the order of the 6th of October, according to which the cause was to be brought to a hearing as soon as possible. At any rate the defendant was discharged from his undertaking not to alter the line of construction.

The amended bill made a new case, to meet which the defendant must put in an answer.

Giffard, Q.C., and *Everitt*, for the plaintiff.

A plaintiff might obtain an order of course to amend, after having given notice of motion for decree, and even after the defendant had filed his affidavits in answer,

Gill v. Rayner, 1 K. & J. 395.

The amendments did not introduce any facts not previously stated in the affidavits, nor was any fresh relief prayed. If the defendant had waived his right to put in an answer, the amendment of the bill would not have delayed the hearing of the cause.

There was no precedent for a defendant moving to be discharged from an injunction or undertaking on the ground of the plaintiff's having amended. The question, whether the plaintiff's amending discharged him, had always been discussed, as in

Attorney-General v. Marsh, 16 Sim. 572,

upon a motion to commit for a breach of the injunction or undertaking.

WOOD, V.-C., said, that justice required that the defendant should be discharged from the undertaking not to alter the line of construction. It was clear upon the construction of the order of the 6th of October, that the plaintiff was to file all his affidavits on or before the 29th of October, and the defendant, all his affidavits in answer on or before the 8th of November, and although the order did not say when

the case was to be set down, it implied that it was to be done as soon as possible. It was also clear, that the affidavits to be filed were to relate to the case as it then stood upon the bill, not to some new case. The time for the plaintiff's filing affidavits had been enlarged; but he must assume that that had been done without opposition. Under those circumstances, the plaintiff obtained an order of course to amend his bill, and amended it accordingly. He could not go into any question as to the nature of the amendments. The amendment of the bill implied that the plaintiff was making a new case, and introducing a new set of facts to support it; and this was a breach of the whole spirit of the order of the 6th of October, according to which everything was to be done for expedition. The undertaking must, therefore, be discharged with costs; he did not see any reason for interfering with the amendments.

Wood, V.-C. }
10, 22 Nov. 1864. } **FORD v. TYNTE.**

Power—Portions for Younger Children—Advancement by Father.

A father and mother having a joint power of appointment among younger children of a fund under a settlement, appointed two equal shares in the fund to two daughters on their respective marriages, and on the marriage of a third daughter, the father being pressed by the husband to settle a sum of money immediately, advanced out of his own moneys a sum equal to the share the daughter would be entitled to in the fund. Contemporaneous evidence that, but for the circumstances, the father would have joined with his wife in the exercise of the power of appointment, and only made the advance in substitution for such appointment:—

Held, sufficient to entitle the father to be considered the purchaser of his daughter's share in the unappointed fund.

By indenture of settlement, dated the 3rd of April, 1827, made pursuant to articles entered into previous to Colonel Tynte's marriage, certain lots, called the Halswell estates, were limited, subject to the life-estate of Colonel Tynte, and a jointure rent-charge of 1,600*l.* in favour of Mrs. Tynte, to trustees for the term of two hundred years, to commence from the day of the death of Colonel Tynte, upon trust, in case there should be one or more child or children of the marriage besides an eldest or only son, then for the trustees, either during the lifetime of Colonel Tynte, with his consent, or, after his decease, by lease or mortgage, to raise 20,000*l.*, for the portion or portions of all and every such child or children (not being an eldest or only son), and to be paid at such times and in such proportions, manner, and form, as Colonel Tynte and Anne his wife, or the survivor, should appoint, and in default of appointment, to

raise the sum of 20,000*l.* for the portion or portions of such child or children, to be paid in manner following, i.e., if only one such child, then at his or her age of twenty-one years, and if two or more such children, to be paid to and equally divided among them, share and share alike, at their respective ages of twenty-one years. Neither the articles nor the deed of settlement contained any hotchpot clause.

The issue of marriage, besides an eldest son, were Lady Cooper, Mrs. Kemmis, Mrs. Campbell, and Jane Kemeys Tynte.

On the marriage of Lady Cooper, Colonel and Mrs. Tynte, by deed-poll dated 12th of April, 1827, appointed a sum of 5000*l.*, part of the 20,000*l.*, to Lady Cooper absolutely, with a proviso that, unless they or the survivor should afterwards make some appointment to the contrary, Lady Cooper should not be entitled to any further or other share in the sum of 20,000*l.*, without bringing the sum of 5000*l.* thereby appointed into hotchpot.

On the marriage of Mrs. Kemmis, by another deed-poll, dated 11th of September, 1833, Colonel and Mrs. Tynte appointed 5000*l.*, other part of the 20,000*l.*, to Mrs. Kemmis. This deed-poll contained no hotchpot clause.

On the marriage of Mrs. Campbell, in 1834, Colonel Tynte, by mortgage of other estates and also of his life interest in the Halswell estate, raised a sum of 5000*l.*, which he paid to the trustees of Mrs. Campbell's settlement.

Jane Kemeys Tynte died on the 22nd of September, 1834, having attained twenty-one years of age, and Colonel Tynte, her father, took out letters of administration of her personal estate and effects.

Mrs. Tynte died on the 26th of January, 1836.

In the recital to a deed made on the 10th day of April, 1841, which noticed the charge of 20,000*l.* for the portions of younger children, Colonel Tynte claimed to be absolutely entitled to two of those portions.

On the death of Colonel Tynte, a deed, dated 14th of June, 1851, purporting to be a deed-poll by Colonel Tynte and Mr. and Mrs. Campbell, but which was only executed by Colonel Tynte, and which appeared never to have been communicated to either Mr. or Mrs. Campbell, was found among some papers in a drawer in Colonel Tynte's library. This deed, after reciting the settlement of the 27th of April, 1827, the then state of the family, and the two appointments in favour of Lady Cooper and Mrs. Kemmis, and that the power of appointment had not been further exercised, proceeded as follows: "And whereas upon the marriage of the said Louisa Kemeys Tynte with the said Simon Fraser Campbell, the said Charles K. K. Tynte paid to her out of his own private moneys a sum of 5000*l.*, for her quarter part of the said sum of 20,000*l.*, on an understanding that he should be entitled to such quarter part of the said sum of 20,000*l.*, as the said Simon Fraser Campbell and Louisa his wife do hereby acknowledge." It also recited the death of Jane

Kemeys Tynte; that Colonel Tynte was desirous that the two fourth parts to which he was entitled should not be raised; that Mr. and Mrs. Campbell had agreed to join in the release: and then proceeded to release and discharge the estates charged from such two fourth parts and all claims and demands in respect thereof.

Colonel Tynte died on the 22nd of November, 1860, having appointed Lady Cooper his executrix, who proved his will.

No part of the sum of 20,000*l.* was ever raised.

Several letters between Colonel Tynte, Mr. Bicknell, his lawyer, and Mr. Campbell were produced to show that the advance of 5000*l.*, made by Colonel Tynte to Mrs. Campbell on her marriage, was caused by the importunity of Mr. Campbell, who wished to obtain 5000*l.* at once on his marriage, and was unwilling to wait till the portion, which Colonel and Mrs. Tynte might appoint under the settlement, would on their deaths come into possession. These letters were much relied upon by the Vice-Chancellor.

The following letter was one written by Mr. Bicknell to Colonel Tynte,

"23rd June, 1834.

"MY DEAR SIR,—I have had the pleasure of seeing Mr. Campbell this morning. He mentions that your daughter, he understands, is entitled to 5000*l.* now, and 5000*l.* at your death. In our conversation yesterday, you only referred to the 5000*l.* under the settlement. Is it your intention to covenant to bequeath her another 5000*l.*, as was done in the case of Mrs. Kemmis? In that case a jointure was settled by Mr. Kemmis upon your daughter. Mr. Campbell declined instructing me further until he had seen you again. He states that it is not his intention to bring anything into settlement.

"I am, &c.

"H. BICKNELL."

There appeared to have been no answer to that letter. The next letter was also from Mr. Bicknell to Colonel Tynte,

"28th June, 1834.

"MY DEAR SIR,—I had some communication with Mr. Campbell yesterday, but he appeared most anxious to have the 5000*l.* raised at once, as he has been promised a most advantageous investment. I think it possible, upon considering the settlement and the mortgage to Mr. Fripp, that the money may be obtained at 5*l.* per cent. It will be necessary that you, as having the life estate, should join, as also Mrs. Tynte, who has a jointure at your decease, as these interests take precedence of the term of 200 years which is limited for raising the portions, and which term is not to commence with your decease.

"I am, &c.,

"H. BICKNELL."

Mr. Bicknell again wrote to Colonel Tynte on the 2nd of July, 1834,

"MY DEAR SIR,—I have had Mr. Campbell with me this morning. He states that everything must depend upon the possibility of the 5000*l.* being raised at once; and is most anxious that his state of suspense should be put an end to. I wrote you fully upon the subject on the 28th ultimo, and shall be glad to have your answer. As your life estate must be the security whilst it lasts, it is obviously most important that there should be no incumbrances by judgments or annuities which might affect it; if there be, I cannot hope that any party will be readily found to advance the money. I have promised to write Mr. Campbell as soon as I hear.

"I am, &c.,

"H. BICKNELL."

In reply, Colonel Tynte wrote to Mr. Bicknell on 4th of July, 1834,

"MY DEAR SIR,—I have been inattentive to business since I left town, but am hard at work, and am in hopes of being able to procure the 5000*l.* in the country, with less trouble and inconvenience in every way than in town; but you know that it is not to be done by magic, however impatient people may be.

"I remain, &c.,

"C. K. K. TYNTE."

On the receipt of this letter, Mr. Bicknell wrote on the 7th of July to Mr. Campbell, informing him of the contents of Colonel Tynte's letter; and on the 15th of July, 1834, Colonel Tynte again wrote to Mr. Bicknell,

"MY DEAR SIR,—I have 5000*l.* ready for my daughter Louisa's marriage portion; and as the parties are anxious that the marriage should take place soon, I wish you to proceed with the settlements immediately, which, as there are no covenants and no difficulties to meet, need not be long or take much time preparing.

"I remain, &c.,

"C. K. K. TYNTE."

Mr. Bicknell then wrote to Colonel Tynte,

"19th July, 1834.

"MY DEAR SIR,—I received your letter, and have since been with Mr. Campbell, and the draft of the settlement is now preparing. I shall thank you to inform me if the 5000*l.* has been raised under the powers of the settlement of Halswell, of 1827."

The question adjourned from Chambers was, what part of the 20,000*l.* ought now to be raised.

Giffard, Q.C., and *Kingdon*, for Lady Cooper.

Where a father advances out of his own moneys the portion to which a daughter may be entitled under a power of appointment, the *prima facie* inference is, that he intends to increase the portions of his other

children. Here there is no contemporaneous declaration that Colonel Tynte intended otherwise.

The deed-poll of the 14th of June, 1851, even if it ever was intended to take effect, is in its present state incomplete and inoperative.

A hotchpot clause was intended by the articles to have been inserted in the settlement of the 3rd of April, 1827, and ought to be implied. In that case Lady Cooper will be entitled, as Colonel Tynte's executrix, to 5000*l.*, Jane Tynte's portion, and one-third of the 5000*l.*, Mrs. Campbell's portion, purchased by Colonel Tynte for the benefit of his daughters other than Mrs. Campbell: Lady Cooper will also be entitled, beneficially, to another third of the purchased portion: and the remaining third will go to Mrs. Kemmis.

The whole 20,000*l.* must be raised,

Lee v. Heap, 1 Kay & J. 620;

Lord St. Leonards on Powers, 634 (8th ed.);

Noblett v. Lichfield, 7 Ir. Ch. Rep. 575;

Folkes v. Weston, 9 Ves. 456.

James, Q.C., and *Miller*, for Mrs. Kemmis.

The question is, how much of the 20,000*l.* is to be now raised, and not whether the settlement of 1827, ought to be rectified by the introduction of a hotchpot clause. Two shares were appointed, two remain unappointed. Lady Cooper cannot take any share in the unappointed fund without bringing her 5000*l.* into hotchpot. The 10,000*l.* unappointed must be divided between Mrs. Kemmis, Mrs. Campbell, and the representative of Jane Tynte. There was no appointment to Mrs. Campbell; and the release, as it never was communicated to any one besides Colonel Tynte's legal adviser, must be held incomplete.

Rolt, Q.C., and *Renshaw*, for plaintiff, an incumbrancer on the estate.

It is not necessary to prove an absolute contemporaneous declaration by the father of his intention to purchase the share of his daughter; it is sufficient to show that the intention existed at the time. Such an intention is here sufficiently shown both by the letters of Bicknell during the treaty for the marriage of Mrs. Campbell, and the subsequent transactions, though the latter must be regarded with suspicion. Colonel Tynte could not by himself have made any appointment at the time, but he could and did become the purchaser of the share Mrs. Campbell would ultimately be entitled to in default of appointment,

Smith v. Lord Camelford, 2 Ves. jun. 698;

Noel v. Lord Walsingham, 2 S. & S. 99.

Lady Cooper is practically excluded by the hotchpot clause in her marriage settlement. The fund unappointed, viz., 10,000*l.*, must be divided into thirds, and only one of these will be raiseable, the other two will sink for the benefit of the estate.

Sir H. Cairns, Q.C., and *Beavan*, for other incumbrancers.

22 Nov. 1864.

Wood, V.-C., stated that the authorities reviewed by him in *Lee v. Heap*, which case had since been followed in *Noblett v. Lichfield* (*loc. cit.*), had established the rule that where a father makes an advance *simpliciter* to a child he must be taken to have done it with the intention of increasing the portions of his other children. This intention was capable of being rebutted, and, for this purpose a formal declaration in writing at the time was not necessary. Lord St. Leonards, in his Book on Powers, placed the whole question on the intention of the father at the time. Strict evidence must be given, and he must reject any evidence derived from subsequent transactions. From the correspondence between Colonel Tynte, Mr. Bicknell, and Mr. Campbell as to raising the 5000*l.*, it appeared that if Mr. Campbell had been content to wait, and had not required the 5000*l.* immediately, a regular appointment would have been made of the portion, under the power in the settlement. This, in his Honour's opinion, sufficed to rebut the presumption of an intention to benefit the other children. Besides, the sum advanced, viz., 5000*l.*, was the exact amount appointed to each of his two other married daughters. Colonel Tynte must, therefore, be held to have purchased for his own benefit Mrs. Campbell's share in the 10,000*l.*, unappointed residus. Lady Cooper being excluded, Mrs. Kemmis, Mrs. Campbell, and the representative of Miss Tynte each took one-third of this 10,000*l.* Colonel Tynte, therefore, as purchaser of Mrs. Campbell's share, and administrator of Miss Tynte, was entitled to two equal third parts or 6,666*l.* 13*s.* 4*d.* What had Colonel Tynte done with these shares? By the deed of the 14th of June, 1851, considering himself entitled to two shares of 5000*l.* each, he released them for the benefit of the estate. It was argued that this could not be a release, that it purported to be a deed-poll, that Mr. and Mrs. Campbell were made parties for the purpose of concurring in and corroborating it, but had never executed the deed. But, although the deed was kept among Colonel Tynte's papers, it was duly executed, sealed, and delivered by him, and his Honour could not see why the addition of parties who had, as he had already held, no interest to release, should prevent the deed having its usual effect. Consequently the 6,666*l.* 13*s.* 4*d.* had sunk for the benefit of the estate, and was no longer raiseable.

Minute.—The sum of 13,333*l.* 6*s.* 8*d.* to be raised together with the costs of the trustees, and of all those interested in the portions. Plaintiffs and other incumbrancers who were allowed to appear, to elect, whether they would add their costs to their respective securities, or take them as costs in the cause.

COMMON LAW.

Q. B. }
12 NOV. 1864. } REGINA v. PURDEY.

Appeal from Summary Conviction to Quarter Sessions—Conviction quashed—Costs against Prosecutor—Parties to the Appeal—12 & 13 Vict. c. 45, s. 5—Specification of Omission or Mistake in Order, Section 7.

A, summarily convicted by Justices under 5 Geo. 4, c. 83, s. 4, on the prosecution of P, appealed to Quarter Sessions, and gave notice thereof to the Justices, under s. 14. The appeal was entitled "A, appellant v. — and — Justices for G. Y. and P. respondents." When the appeal was called on, A appeared, but no one appeared to support the conviction. The Court thereupon made an order quashing the conviction, and awarding costs against P. The order having been brought up by certiorari, on a rule to quash it:—

Held, that as no one appeared to support the conviction, the Court of Quarter Sessions had power to quash it:

Held also, following Regina v. William Smith, that P, and not the Justices, was "the party against whom" the appeal "was decided" within the meaning of 12 & 13 Vict. c. 45, s. 5, and therefore that the Court of Quarter Sessions had jurisdiction to award costs against P:

Held also (per MELLOR, J.), that an objection to the validity of the order, because P did not appear therefrom to be the real respondent, was not "specified" within the meaning of 12 & 13 Vict. c. 45, s. 7, by the mere words of the rule, "that the said order is bad on the face thereof."

One Ashby was convicted by certain Justices for the borough of Great Yarmouth, as a rogue and a vagabond, under 5 Geo. 4, c. 83, s. 4, the defendant Purdey being the prosecutor. Under section 14, Ashby appealed to the Quarter Sessions, and duly gave notice of such appeal to the Justices, as required by the statute. He also gave notice to Purdey, which was not required by the statute.

The appeal was entitled, "*Ashby, appellant v. — and — the Justices of the Peace for the borough of Great Yarmouth, and James Purdey, respondents.*" When the case was called on, Ashby appeared by counsel. The Recorder inquired if any one appeared for the respondents? No answer being made, and no one appearing, service of the notices of appeal was proved, and the Recorder made an order quashing the conviction, and awarding costs against Purdey. On the Recorder then asking who Purdey was, he—

having been sitting in Court, and within hearing during the whole of the proceedings,—then, for the first time, answered to his name; and, on the Recorder asking why he had not appeared to support the conviction, said, he thought the Justices would have done so, but that he was ready to give the same evidence as he gave before, with other evidence to substantiate it. The Recorder refused to receive it—the case having been heard.

The above was the conclusion on the facts to which this Court came, after hearing contradictory affidavits.

A writ of *certiorari* had been issued, and a rule *nisi* obtained, calling on the prosecutor to show cause why the order of Quarter Sessions, brought up on the return to the *certiorari*, should not be quashed, for the insufficiency thereof.

One of the objections stated in the rule was that "the said order is bad on the face thereof."

Bulwer now showed cause.

The Recorder had jurisdiction to quash the conviction, and give costs by 12 & 13 Vict. c. 45, s. 5, which refers to 11 & 12 Vict. c. 43, s. 18. The costs were rightly given against Purdey, who was the prosecutor before the magistrates, was a respondent in the appeal, and was "the party against whom the same was decided" within section 5 of 12 & 13 Vict. c. 45.

The point has been settled,

Regina v. William Smith, 29 L. J. M. C. 216, following,

Rea v. Justices of Hants, 1 B. & Ad. 654.

[MELLOR, J.—If the prosecutor says, "I will not support the conviction, I will do nothing," is he to have costs awarded against him?]

[CROMPTON, J.—But he has set it all in motion originally.]

That is all for the discretion of the Quarter Sessions, and to be urged before them.

As to the objection, that there was no "hearing," in law or in fact, the appellant appeared, the respondent did not, and therefore, according to the usual practice, the conviction was quashed. Even if there had been no hearing, and if evidence had been tendered and refused by the Recorder, that goes to his discretion, not to his jurisdiction. The proper remedy then would be by criminal information or *mandamus*,

Ex parte Hopwood, 15 Q. B. 121;

Rea v. Justices of Carnarvon, 4 Barn. & Ald. 86.

There is nothing here which can make *certiorari* the proper remedy.

The objection in the rule, that "the order is bad

on the face of it," does not specify the ground why the order is bad, and cannot, therefore, be urged now, 12 & 13 Vict. c. 45, s. 7.

Keane, Q.C., in support of the rule.

The Recorder had no jurisdiction to give costs against Purdey.

1st. The Justices were the real respondents to this appeal. By section 14 of 5 Geo. 4, c. 83, it is the Justices who are opposed to the appellant, not the prosecutor, as notice is required to be given to them, not to him.

Regina v. Justices of Hants, does not apply. There the informer was found to be the real party, because he had an interest in obtaining and supporting the conviction. This was not brought under the notice of Hill, J., in *Regina v. William Smith*.

2nd. Section 14 of 5 Geo. 4, c. 83, says the Court of Quarter Sessions, "shall hear and determine the matter of such appeal." Here there was no hearing.

3rd. Purdey was arbitrarily made a party. There being no hearing, he was not, and could not be found to be, a party.

4th. When Purdey offered evidence, the Recorder ought to have re-opened the case; and certainly ought not to have awarded costs against him.

5th. The order of Quarter Sessions is bad on the face of it, because it does not appear therefrom that Purdey was the real respondent.

COCKBURN, C.J.—I think the rule ought to be discharged. The first question is, whether the Recorder had the power to treat this appeal to him as being within his jurisdiction, and to quash the conviction? The ordinary course of appeals at Quarter Sessions, I understand to be as follows: When the appeal is called on, the respondent is bound to make out his case. If no one appears on behalf of the respondent, the Court must reverse the conviction. The fact that neither the respondent nor any one on his behalf appears, shows that the respondent is unwilling or unprepared to sustain the conviction. Now there is nothing in the affidavits in this case to show that anything irregular was done before the Recorder. The order then was in two parts: the first, to quash the previous conviction; the second, to order in addition that Purdey should pay the costs. This is objected to, on the ground that, by the statute 5 Geo. 4, c. 83, s. 14, notice of appeal is required to be given to the Justice or Justices whose act or determination is appealed against, and not to the prosecutor; and, therefore, that it is the Justices, and not the prosecutor, Purdey, who are really the respondents and opposite party. Now the power to give costs in appeals at Quarter Sessions is given by 12 & 13 Vict. c. 45, s. 5, which says that the Court "may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties" such costs as are reasonable. Therefore, if the prosecutor Purdey was not a party to the appeal, and the

Justices were, then Mr. Keane is right, and the Recorder ought not to have given costs against Purdey. But I think, both from my own reading of the statutes and from high authority, that although the 5 Geo. 4, c. 83, s. 14, says notice of appeal is to be given to the Justices, and does not require any notice to be given to the prosecutor, yet that the Justices are not parties to the appeal, but that the person convicted and the prosecutor or informer are the adverse parties. Now section 5 of 12 & 13 Vict. c. 45, says in the words I have already quoted, that the Court may give costs, and then proceeds to say that those costs shall be "recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by the Act" 11 & 12 Vict. c. 43. Section 18 of the latter Act gives the Justices, in cases of summary conviction, power to order the defendant to pay costs to the prosecutor or complainant respectively, and on the other hand to order the prosecutor or complainant respectively to pay costs to the defendant, and by the 12 & 13 Vict. c. 45, s. 5, the same power is, as I read it, vested in the Court of Quarter Sessions. It certainly would be most strange if the Legislature intended that the Justices below should alone have power to give costs against the prosecutor, and that the Court of Quarter Sessions sitting on appeal and being the higher Judges, should not have a similar power. We clearly ought, if possible, to construe the two statutes so as to make them harmonise.

A very high authority in favour of this view is the case of *Rex v. Justices of Hants*. There a man was convicted on an information before Justices, and there was an appeal to the Quarter Sessions under an Act which directed, just as in the case now before us, that the appellant should give notice of the appeal to the Justices by whose act he was aggrieved; and, as here, no notice was required to be given to the party prosecuting. The Act gave the Court of Quarter Sessions power to award costs "to the parties appealing or appealed against." The informer did not appear at the hearing of the appeal, and the Sessions quashed the conviction and ordered the informer to pay costs to the appellant. It is true that there the informer had a pecuniary interest, namely, to the extent of half the penalty, in prosecuting and supporting the conviction, but the decision did not turn on that point, but on the question, whether the Justices were the parties "appealed against," or the person upon whose information the conviction was made? In an advised judgment Lord Tenterden says, "It is true the Act directs notice to be given to the Justices, not to the party prosecuting or defending. But it would be a great anomaly to cause a Justice who acts *bona fide* in the discharge of his judicial duty, to pay costs. The question is, what is the meaning of the words, 'the party appealing or appealed against'?" The party appealing here is manifestly the party convicted; and if that be so, the informer is the only person who can

satisfy the words 'party appealed against.' He must therefore pay the costs, if such costs be adjudged."

Again, in *Regina v. Smith*, the conviction and appeal were under the same Act as here, 5 Geo. 4, c. 83; and as here, the costs were awarded under section 5 of 12 & 13 Vict. c. 45, which says that upon any appeal the Court may order "the party or parties against whom the same shall be decided" to pay costs. Hill, J., said, "I think I am putting a just conclusion on the words of section 5, in giving to them the same meaning as was given" by Lord Tenterden in *Rez v. Justices of Hants*. There is no Judge for whose opinion I entertain a more profound respect than Mr. Justice Hill, and I quite agree with the conclusion to which he came.

The point was then raised, that even if Purdey were the prosecutor, and so liable to pay costs, yet as no evidence was taken before the Recorder, there was nothing to show that he was the prosecutor. This question is entirely one of fact for the Recorder. Purdey was named as a respondent in the appeal. The law considers that a prosecutor should exercise vigilance, and ascertain whether or not notice of an appeal has been given. Moreover, section 9 of 5 Geo. 4, c. 83, enacts, that when any such rogue and vagabond shall give notice of his intention to appeal against the conviction, and shall enter into recognisances to prosecute the appeal, the Justice shall require "the person or persons whose evidence shall appear to him to be material to prove the offence, and to support such conviction," to become bound in recognisances to appear at the Quarter Sessions and give evidence. Purdey was named as a party to the appeal, and the Recorder might know from the recognisances whether Purdey was bound over to appear and give evidence or not. If, indeed, Purdey had been simply a witness when the conviction was made, and not the prosecutor, and he had then been made a respondent to the appeal when he ought not, and so jurisdiction had been assumed by the Recorder against Purdey as a party when he was not really a party, in such a case an application to us to set aside the order of the Recorder might be successful, but that is a question which we need not decide here. In point of fact, Purdey was the prosecutor on the showing of his own affidavit; and if a man chooses to say, "I am the prosecutor," it would be most mischievous to say that because the prosecutor does not appear at the hearing of the appeal, and evidence is not given that the respondent is really the prosecutor, therefore the Court has no power to give costs against him.

There is no doubt of the fact that Purdey was the real prosecutor, and I think that he was the party against whom the appeal was decided within the meaning of section 5 of the statute, and that the Recorder had power to award costs against him. As to the question, whether the Recorder ought to have reheard the case, or whether under the circumstances it was discreet in him to make the order he did, one may have one's

private opinion, but all that is entirely a question for the discretion of the Recorder. The case was within his jurisdiction if Purdey, as prosecutor, was a party to the appeal. My Brother Crompton, who has been called away, wishes me to say that he concurs.

MELLOR, J.—I am of the same opinion. In this case I feel bound by authority, and I think that the cases cited give the right construction. As to Mr. Keane's objection that "the order of Quarter Sessions is bad on the face thereof," because it does not appear therefrom that Purdey was found to be the real respondent, I see it appears on the face of the order that Purdey was a respondent. Moreover, if that had not been so, I think he could not have taken that objection, because section 7 of the 12 & 13 Vict. c. 45, says, "no objection on account of any omission or mistake in any such order or judgment brought up upon a return to a writ of *certiorari* shall be allowed, unless such omission or mistake shall have been specified in the rule for issuing such *certiorari*." The word "bad" in this rule, merely points to anything or nothing, and does not specify the omission.

Rule discharged.

Q. B. } GILES v. SINEY.
15 Nov. 1864.

Evidence—Previous conviction under Vagrant Act, 5 Geo. 4, c. 83, ss. 4, 17.

On an indictment under the 5 Geo. 4, c. 83 (Vagrant Act), the minute book of the Sessions where the conviction took place, to prove a previous conviction under the Act, is not sufficient evidence, but a certified copy of the record of such conviction must be produced.

This was an appeal on a case reserved by the Justices of Newbury, on a conviction under section 4 of the Vagrant Act. The appellant was convicted under section 4 of that Act, for professing to be a wise woman and to tell fortunes. A previous conviction at a court of Petty Sessions was laid, and to prove it the minute book of the court where the prisoner had been convicted was produced, and the policeman who had been present at the time swore to the fact of the conviction. It was objected that this evidence was insufficient. Section 17 of 5 Geo. 4, c. 83, enacts—"That no proceedings to be had before any Justice or Justices of the peace under the provisions of this Act shall be quashed for want of form; and every conviction of any offender, as an idle and disorderly person, or as a rogue and a vagabond, or as an incorrigible rogue under this Act, shall be in the form or to the effect following, or as near thereto as circumstances will permit, [here follows the form]. And the Justice or Justices of the peace before whom any such conviction shall take place shall, and he and they is and are hereby required to, transmit the said conviction to the next general or quarter Sessions of the peace to be holden in and for the county, riding, or division, or

place wherein such conviction shall have taken place, there to be filed and kept on record; and a copy of the conviction so filed, duly certified by the clerk of the peace, shall and may be read as evidence in any court of record, or before any Justice or Justices of the peace acting under the powers and provisions of the Act."

Harrington, for the appellant, cited,
Regina v. Yeoveley, 8 Ad. & E. 806;
Regina v. Ward, 6 Car. & P. 386.

COCKBURN, C.J.—We have no alternative but to set this conviction aside. The evidence of the previous conviction was not such as ought to have been received.

Conviction quashed.

Q. B. } CALEY v. THE LOCAL BOARD OF
16 Nov. 1864. } KINGSTON-UPON-HULL.

Public Health Act, 1848—11 & 12 Vict. c. 63,
s. 68—"Level."

The word "level" in section 68 of the Public Health Act is to be construed as referring to the particular street only, without reference to surrounding streets.

This was an appeal on a case stated by the magistrates of Kingston-upon-Hull, on sections 68 and 69 of the *Public Health Act*, 20 & 21 Vict. c. 63. Section 68 of that Act enacts as follows:—

"That all present and future streets being or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said Local Board of Health, and the said Local Board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired as and when occasion may require, and they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers, and whosoever wilfully displaces, takes up, or injures the pavement, stones, materials, fences, or posts of any such street without the consent of the said Local Board shall be liable for every such offence to a penalty not exceeding five pounds, and a further sum not exceeding five shillings for every square foot of the pavement, stones, or other materials so displaced, taken up, or injured."

Section 69. "That in case any present or future street, or any part thereof (not being a highway) be not sewered, levelled, paved, flagged and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoin-

ing, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act, and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said Local Board to be private improvement expenses, and be recoverable as such, in the manner hereinafter provided."

The street in which Caley, the appellant, resided was required by the Local Board of Health of Kingston-upon-Hull, to be raised to the level of the adjacent streets, and in default of the occupiers they ordered it to be done, and charged the occupiers with the expenses. The appellant refusing to pay, the magistrate at Kingston-on-Hull made an order on him to do so, but stated a case for the Court to raise the question whether the enactment applied to the case, or merely to the levelling of the inequalities in the particular street.

Atkinson, Tindal, Serjt. (Peel with him), in support of the order.

P. Thompson, for the appellant.

COCKBURN, C.J.—Our judgment must be for the appellant. I am of opinion that the Board exceeded their powers. By the Act of Parliament, "they may call on the owners and occupiers to do certain works, and if they fail to do so, they may do the works themselves and recover the expenses." This applies to anything necessary to make that particular street uniform, and we must look at the question as if that street stood as an isolated one, and they have an authority to make it of an uniform level. It might be more convenient that it should be on a level with the street which crosses or meets it, but we cannot attach this burden on an individual owner for the convenience of the neighbouring streets. I should be disposed to think that if the works were works incidental to "channelling" works, that they were incidental to the powers given them in the section, but that is not found in the case; consequently the order was made without jurisdiction.

CROMPTON and MELLOR, JJ., concurred.

Judgment for the appellant.

Q. B. } SHEPHERD and Another v. THE
16 Nov. 1864. } POSTMASTER-GENERAL.

*Arrest for Felony—Charge of Misdemeanor—
24 & 25 Vict. c. 97, s. 52.*

The prisoners were arrested for felony, but it being discovered that the offence committed was only a misdemeanor, the charge was proceeded with before the magistrate as a misdemeanour, without a fresh information; no objection was raised until the merits had been gone into; the prisoners were convicted:—

Held, on appeal, that it was too late to raise the objection, which was a merely formal one, and that the conviction was right.

This was an appeal on a case stated by Justices of Dresden in Staffordshire, by order of the Court.

On the 9th of January last, it was discovered that several of the letters in a pillar-box belonging to the Post Office of Dresden, in Staffordshire, were burnt. The appellants were arrested under section 10 of the 24 & 25 Vict. c. 97, but were charged with setting fire to the letters in the pillar-box, and convicted under section 52 of that Act; for the attorneys having consulted the authorities at the Post Office in London, were advised that the charge could not be sustained on any section except section 52, and accordingly proceeded under that section.

At the close of the case for the prosecution it was objected that, inasmuch as they were not found committing the offence and no information on oath had been taken on the charge on which they had been convicted, they were not legally in custody. The objection was overruled, and the appellants were convicted under section 52, and sentenced to a month's imprisonment with hard labour. The magistrates having refused to state a case under the Summary Jurisdiction Act, being subsequently ordered to do so by a rule of this Court, had done so, the question for the opinion of the Court being, whether the appellants were legally convicted under section 52 of the 24 & 25 Vict. c. 97, having been apprehended under section 10 of that Act.

The *Solicitor-General* (*Poulden* with him) in support of the conviction.

It is true they were apprehended for what was supposed to be a felony, but were subsequently charged with a misdemeanor; it would have been different had the parties refused to appear to the charge, but by their appearance they waived the necessity of a summons, Paley on Convictions, 80.

They were before the magistrates; the right charge was made, and no objection was raised till the merits were gone into, when it was too late. No information on oath or in any particular form was necessary; there had been information on oath, although the nature of the offence was at first mistaken, and the convictions were legal and valid.

Harrington for the appellants.

The appellants were in custody, charged with an indictable offence, on which the jurisdiction of the magistrates was merely preliminary, and they could not change it to a misdemeanor, and summarily convict.

[COCKBURN, C.J.—It has been held in this Court that a man may be convicted of an assault on a charge of assault, though the evidence would establish a charge of rape.]

In that case the magistrates might disbelieve the evidence of the graver offence, and the offence charged was the minor one, here the charge was of the graver offence. They were brought up on a charge of felony, and they were convicted on another charge. Under Jervis's Act, the party was entitled to have the substance of the information stated to him. It was laid down in Paley on Convictions, that in all summary proceedings, there must be an information or complaint in order to give the magistrates jurisdiction to convict, and there was none here on the charge on which the prisoners were convicted,

11 & 12 Vict. c. 43, s. 14 (Jervis's Act);

Martin v. Pridgeon, 1 El. & El. 778;

Regina v. Brickhall, 4 N. R. 166; 33 L. J. M. C. 156;

Williams's Saunders, i. 263;

[SHEE, J., cited,

Gelan v. Hall, 27 L. J. M. C. 78.]

COCKBURN, C.J.—You cannot ask us to send back a case where substantial justice has been done, on merely technical grounds. It was a mere form, the magistrates not calling on the parties to answer to the charge, proceeded on. The evidence given was as applicable to a case of misdemeanor as to a felony. As to the offence, the only question was whether it was a felony, as was supposed by the constable who arrested them, and the prosecutor's attorney. No objection is made, the merits are gone into, and the offence turns out to be a misdemeanor. In strictness you are entitled to the witness giving his information over again, but the facts were the same, and the objection which might have been raised by the defendants was waived: consequently there was no infringement of the Act of Parliament, and the conviction was right.

CROMPTON, J.—I am of the same opinion. It is not necessary in every case to have an information and a summons under section 61. The parties were brought before the magistrates: if when they were there, the advisers of the appellants had taken the objection, and had asked for time, and the magistrates had refused to grant them time, I should have blamed them, but the objection was not taken till the case for the prosecution was concluded. The old rule stated in Saunders that the want of a summons is cured by an appearance, applies here, and the parties cannot complain; it is too late to raise a formal question like this.

MELLOR, J.—I concur. The appellants were irregularly apprehended, but they appeared to the charge, and the facts were the same to support one charge as the other; the mere fact of having been brought up to answer a charge of felony makes no difference, as by once appearing, and not taking it in time, the objection was waived.

SHEE, J., concurred.

Conviction affirmed.

Q. B. } REGINA v. PEDLER and Others.
16 Nov. 1864. }

Church-rate—Jurisdiction of Justices—Effect of disputing the Validity of Rate—53 Geo. 4, c. 127, s. 7.

Under section 7 of 53 Geo. 4, c. 127, a person against whom an order for the payment of church-rates is made has a right to dispute the validity of such order before the Justices, and if he do so, the jurisdiction of the Justices is ousted, and that of the Ecclesiastical Court attaches.

*At the hearing of an information before Justices, under the section for the non-payment of a church-rate, the attorney for the defendant objected, 1st, that the rate was excessive, as there was already money in the hands of the churchwardens available for the purpose for which the present rate was raised; and 2nd, that a new valuation of the parish had been made, and therefore the old assessment was unequal. The Justices held these objections were not *bonâ fide*, and made an order to pay:—*

Held, that the Justices had exceeded their jurisdiction, and that the order must be quashed.

In July, 1863, a rate was made for the repair and maintenance of the parish church of Wellington, in Somersetshire. The rates having been made were not paid by the defendant and others, and accordingly summonses were taken out to enforce payment. The attorney who attended before the magistrate in their behalf, objected—

1st. That a sum of 50*l.*, raised by rate, in November, 1861, for the repair of one of the church pinnacles, had not been so applied, so that the present rate was excessive.

2nd. That in December, 1862, a new valuation of the parish for a new poor-rate had been made, and that the old assessment was unequal.

The magistrates held that their jurisdiction was ousted, and dismissed the summonses. Subsequently the same objections raised by the same attorney on behalf of the other parishioners were over-ruled by the magistrates, and they made an order for payment, leaving the defendant to appeal to the Quarter Sessions. In February, a rule was granted by Mr. Justice Shee, to show cause why a *certiorari* should not issue, to bring up these orders, for the purpose of quashing them.

Karslake, Q.C. (Dowdenwell with him), now showed cause, citing,

Regina v. Blackburn, 32 L. J. M. C. 41.

Joseph Brown, in support of the rule, cited, Rickell v. Bodenham, 4 Ad. & E. 433.

COCKBURN, C.J.—I think the defendants are entitled to judgment. The statute says, if the validity of the rate is disputed, the jurisdiction of Justices is ousted. On the other hand, it is to be said that the right thus secured to a party against whom an order is made must not be abused; and where it is abused by a party fraudulently saying he disputes the validity of a rate, when he does not intend really to dispute it, that is not a dispute to the validity of the rate, and the jurisdiction of the Justices is not ousted. But we cannot allow the magistrates to assert the jurisdiction, and say the notice to dispute the validity of the rate was wrong, on the ground that, on the merits, they are of opinion that the parties who so disputed would ultimately fail. The grounds of dispute may be untenable, and the defendant might fail in establishing the fact of the invalidity, yet the magistrates must not be allowed to hold that the objection was not *bonâ fide*, merely because they thought it would be unsuccessful. In this case a gentleman attended and raised objections, which he enforced by argument and cross-examination, and by documentary evidence, and there was every reason to presume the objections were *bonâ fide*, and it would take a great deal to satisfy me that they were not so. The only question was, were the parties really in earnest in saying that they intended to dispute the validity of the rate? I cannot doubt that they were.

CROMPTON, J.—I am of the same opinion. There were no grounds for the magistrates saying that the objections were *malâ fide*. The right to dispute the rate was not to be abused by an utterly frivolous objection, but we must see whether the magistrates had sufficient ground for saying the objections were *malâ fide*, and I see no fair grounds in this case. A motive is alleged for the objection, but with the motive we can have nothing to do. The jurisdiction of the Justices was ousted, and the orders were invalid.

MELLOR, J.—The course taken by the magistrates was entirely contrary to the statute, the object of which was, to provide a summary jurisdiction to enforce a rate, and was not intended to take away the right to litigate its validity. The mere statement of a man that he objected to the rate would be insufficient—the magistrates ought to see it was *bonâ fide*, and on reasonable grounds.

SHEE, J., concurred.

Rule absolute.

Q. B. } BUCKLE, Appellant v.
19 Nov. 1864. } WRIGHTSON, Respondent.

*Licence—Hackney Carriages—10 & 11 Vict.
c. 89, ss. 37, 45.*

A licence for a hackney carriage from the Commissioners of the Inland Revenue does not supersede the necessity for a licence under 10 & 11 Vict. c. 89, ss. 37, 45.

At a Petty Sessions, held at Darlington, before two Justices for the county of Durham, an information was preferred by the appellant Buckle against the respondent Wrightson, for that the respondent on a certain day, being the proprietor of a certain carriage, permitted the same to be used as a hackney carriage, plying for hire within the prescribed distance, without having obtained a licence from the Local Board of Health for the district of the township of Darlington for the carriage, contrary to the Darlington Local Board Act, 1854.

Section 37 of the Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, enables "the Commissioners" to grant licences to hackney carriages to ply for hire within the prescribed distance. Section 45 enacts, that any proprietor of any carriage permitting the same to be used as a hackney carriage plying for hire within the prescribed distance, without having obtained such a licence, shall be liable to a penalty not exceeding 40s. The Darlington Local Board Act, 1854, incorporates the clauses of 10 & 11 Vict. c. 89, which relate to hackney carriages, and enacts that the words, "the Commissioners," wherever used in that Act, shall mean the Local Board.

It was proved that the respondent had permitted his hackney carriage to ply for hire within the prescribed distance, and that he had no licence from the Local Board. He had a licence from the Commissioners of Inland Revenue for that and other hackney-carriages.

The Justices dismissed the information, but, on the application of the appellant, stated a case under the 20 & 21st Vict. c. 43, for the opinion of this Court, whether they were right or not.

Sawyer, for the appellant.

The licence from the Inland Revenue does not supersede the necessity of obtaining a licence from the Local Board, the object of which is not to derive revenue, but to place the carriages under the control of the Local Board. The fee for the licence from the Local Board is not more than 5s.,

10 & 11 Vict. c. 89, s. 39.

No one appeared for the respondent.

COCKBURN, C.J.—We think the magistrates ought to have convicted the respondent. I think it would be most mischievous to hold that, because a licence for a

hackney carriage has been obtained from the Commissioners of Inland Revenue, and paid for, it is therefore not necessary to have one in addition from the Local Board. I think the magistrates were wrong, and that a revenue licence does not supersede the necessity for a licence from the Local Board.

CROMPTON, MELLOR, and SHEE, JJ., concurred.

Q. B. } MERCANTILE MARINE INSURANCE
20 Nov. 1864. } COMPANY v. TETHERINGTON.

Marine Policy—Loss—Special Clause.

To the ordinary printed form of voyage policy insuring the ship during her voyage from A to B and twenty-four hours after arrival in safety at B, &c., the words were added, "and during thirty days' stay in her last port of discharge":—

Held, the thirty days do not begin to run till the expiration of the twenty-four hours.

This is an action brought for the recovery of money alleged to be due from the defendant by way of contributions towards the sum of 3000*l.* paid by the plaintiffs upon the total loss of a ship called "The Albemarle," which was lost on the 24th of June, 1863. By consent of the parties, and by the order of Mr. Justice Blackburn, dated the 30th of May, 1864, the following case was stated for the opinion of the Court without any pleadings. On the 26th of November, 1862, Messrs. A. Baruchson & Company, the owners of the ship "Albemarle," effected a policy of insurance on such ship for the sum of 2000*l.* This policy was underwritten by the defendant for the sum of 100*l.* On the 26th of December, 1862, the said Messrs. A. Baruchson & Company effected another policy on the said ship for the sum of 1000*l.* On the 4th of December, 1864, the said Messrs. Baruchson & Company effected another policy on the said ship for the sum of 2,000*l.* The said ship sailed from Liverpool on the 23rd of December, 1862, and arrived at Mazatlan, being a port in the Pacific Ocean and her last port of discharge, on the 25th of May, 1863, at 7 P.M., and then anchored there. The vessel remained anchored at Mazatlan in safety until the 24th of June, 1863, and on that day, at 3.45 A.M., she was driven on shore in a gale of wind and was wholly lost. The said Messrs. A. Baruchson & Company, immediately on hearing of the arrival of the said ship at Mazatlan, proceeded to effect insurance on the said ship on her future voyage, and before any intimation of the loss of the said ship they, on the 8th of July, 1863, effected a policy with the plaintiffs.

The said Messrs. A. Baruchson & Co. in like manner covered by insurance the sum of 2000*l.*, being the residue of the said sum at which the ship was valued.

Upon hearing of the loss, the said Messrs. A. Baruchson & Co. applied to the plaintiffs and the

underwriters on the last-mentioned policy to pay them the amount of the loss, and the plaintiffs and the underwriters on such last-mentioned policy thereupon paid to the owners of the said ship the several sums insured by them respectively.

In this action the plaintiffs seek to recover from the defendant the sum of 47l. 15s. 3d., being the sum which the plaintiffs contend the defendant is liable to contribute in respect of the sum of 100l. for which the said policy was underwritten by him as aforesaid, upon the ground that such policy was in force at the time of the loss of the said vessel. (Copies of all the above policies were annexed.)

The question for the opinion of the Court is, whether the policy of insurance so underwritten by the defendant as aforesaid was in force at the time of the loss of the said vessel.

If the Court shall be of opinion in the affirmative, then the judgment shall be entered up for the plaintiffs for 47l. 15s. 3d., and costs of suit.

If the Court shall be of opinion in the negative, then judgment of *non pros.*, with costs of defence, shall be entered up for the defendant.

The plaintiffs' points marked for argument were :—

That the defendant is liable to contribute to the sum paid by the plaintiffs to the assured, the policy signed by the defendant being still in force at the time of the loss, and consequently there being a double insurance on the ship.

That the policy continued in force till the ship should have moored at anchor twenty-four hours, and for thirty days afterwards, and would therefore not expire till the 25th of June.

That the day of arrival at Mazatlan is not to be counted in the thirty days, and consequently the thirty days had not expired when the ship was lost on the 24th of June.

That the first day of the ship's stay in the port of Mazatlan could not, at the very earliest, expire till 7 P.M. on the 26th of May, and consequently the 30th day could not expire till 7 P.M. on the 24th of June, before which time the ship was lost.

The points on the part of the defendant marked for argument were :—

1st. That the policy underwritten by the defendant was not in force at 3.45 A.M., on the 24th of June, 1863.

2nd. That in calculating the thirty days' stay at Mazatlan, the 25th day of May, 1863, is to be included.

3rd. That any other mode of calculation but that above pointed out would render the ship uninsured for a portion of her first day's stay at Mazatlan.

Sir Geo. Honyman, for the plaintiffs.

The question is, had the policy attached at the time of the loss, at a quarter to four, A.M., on the 24th of June, 1863? I submit it had. The adventure was to begin on the 26th of December, 1862, and continue

till twenty-four hours after her arrival, and during thirty days' stay at her port of discharge—was she lost during the thirty days? I submit the thirty days are to be reckoned exclusively of the twenty-four hours.

[COCKBURN, C.J.—You must treat it as if there was no insurance antecedent to the thirty days.]

Yes, the meaning of the policy is, that she is covered for thirty days beyond what she otherwise would have been covered,

Webb v. Fairmaner, 3 M. & W. 473;

Young v. Higgin, 6 M. & W. 49.

Lush, Q.C., for the defendants (the underwriter).

Judgment for the plaintiffs.

**Q. B. } REGINA v. THE INHABITANTS OF
22 Nov. 1864. } DENTON.**

Non-repair of Highway—Indictment without Order of Justices—Frivolous or vexatious defence—5 & 6 Will. 4, c. 50, s. 98.

Where to an indictment for not repairing a highway, part of a turnpike-road, preferred without any order of Justices, the defendants pleaded guilty, having given notice to the prosecutor of their intention to do so three days only before the trial, and after the prosecutor had incurred great expense :—

Held, that there was "no defence" so as to enable the Court, before whom the indictment was preferred, to award costs against the defendants within the meaning of section 98 of 5 & 6 Will. 4, c. 50.

At the Spring Assizes, 1863, at Liverpool, an indictment was preferred against the inhabitants of the township of Denton for not repairing a highway, part of a turnpike-road, on the prosecution of the surveyor of the trustees of the road. It was preferred without any order of Justices, and not under section 95 of 5 & 6 Will. 4, c. 50. On the 5th of August, but after the prosecutor had incurred great expense, the inhabitants gave notice that they intended to plead guilty at the Summer Assizes to be held on the 8th of August, but added, "We shall be obliged to meet you at the Assizes on the question of fine." On the 8th of August they pleaded guilty and Blackburn, J., imposed on them a fine of 1,000l., but to give them an opportunity of repairing the road, ordered that the fine should not be levied till leave should be given by one of her Majesty's Judges at the next Assizes, such Judge to have full power to remit, &c., and to respite till the ensuing Assizes. It was agreed between the prosecutor and defendants that such Judge should have the same power over the costs of the indictment as the Court then had. At the next Winter Assizes the indictment was respited till the Spring Assizes, 1864, when Willes, J., made an order which, after reciting the above facts and that the said highway being a turnpike-road, and it not seeming just to the Court, upon consideration of the circumstances of the case, that the

said fine ought to be apportioned between the said inhabitants and the trustees of such highway and turnpike-road, and that from the circumstances of the debts and revenues of such highway and turnpike-road an apportioned part of the said fine cannot be paid by the treasurer of the said highway and turnpike-road out of moneys now in his hands, or next to be received by him without endangering the securities of divers creditors who had advanced their money upon the credit of the tolls to be raised therefrom, it was ordered by the Court that the fine should be levied upon the goods and chattels of the inhabitants of Denton to the extent of 467*l.*, directed as follows:—

“And it appearing to the said Court and Justices here that the defence made by the inhabitants of the township of Denton to the said indictment is frivolous, and the said Court and Justices here having therefore awarded costs to the prosecutor of the said indictment to be paid by the inhabitants of the said township of Denton, and having directed the amount to be taxed, &c., and the same having been taxed at 129*l.* 12*s.* 7*d.*, it is hereby ordered that the same shall be paid.”

Milward having on the 9th of June, 1864, obtained a rule *nisi* for a *certiorari* to issue and remove the order into this Court, and quash that part of it which related to the costs,

Manisty, Q.C., now showed cause.

The order is good under 5 & 6 Vict. c. 50, s. 98, which enacts that it shall be lawful “for the Court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious.” Here the defence was both frivolous and vexatious. They might have given us notice that they meant to plead guilty earlier than three days before the trial, when we had already incurred great costs.

[COCKBURN, C.J.—Can we say that doing nothing is a defence? Is not this a *casus omissus*?]

[SHEE, J.—How can there be a defence at all until the defendants plead?]

Their “meeting us at the Assizes on the question of fine” was a defence.

[MELLOR, J.—No. That was only an appeal *ad misericordiam*. You went there to enforce the penalty: they went to mitigate it.]

Regina v. The Inhabitants of Haslemere, 1 N. R. 125; 3 B. & S. 313,

decides that where the defendants plead guilty to an indictment under this Act, the costs of the prosecution may be directed to be paid out of the highway rate.

[COCKBURN, C.J.—Yes. But the indictment there was preferred by order of Justices, and the order for costs was made under section 95 of 5 & 6 Will. 4, c. 50.]

The principle is the same here.

Hopwood followed.

The order of Willes, J., finds that there was a defence, and that it was frivolous, and that is conclusive as to the facts.

[COCKBURN, C.J.—Not if we see otherwise that the facts are not so.]

The order is good under 3 Geo. 4, c. 126, s. 110, and the first part of the order recites the very words of that section.

[THE COURT.—That statute is not applicable here.]

Mellish, Q.C., and *Milward*, in support of the rule, were not called upon.

COCKBURN, C.J.—I regret very much that there is no provision in the 5 & 6 Will. 4, c. 50, to award costs when the defendants plead guilty to an indictment for non-repair of a highway preferred without any order of Justices. I do not think that doing nothing and saying nothing until the defendants come into Court constitute a defence, if when they do come into Court they plead guilty. We must take the word “defence” in the ordinary acceptation of the term, which means, defending in open Court. It may be very true that in this case the defendants, until three days before they pleaded, did nothing but throw obstacles in the way of the prosecution, and cause them to incur great costs, but we cannot legislate where the Legislature has failed to do so. I think the order is bad as to the costs, and that the rule must be made absolute.

MELLOR, J.—I think the words of 3 Geo. 4, c. 126, s. 110, were intended to aid the parish by an apportionment of the fine between the trustees of the road and the inhabitants of the parish, and that they do not apply to a case like the present, where the trustees prosecute the parish. I concur with my Lord.

CROMPTON and SHEE, JJ., concurred.

Rule absolute.

C. P. { WILSON and Others, Appellants v.
9 Nov. 1864. { THE CHURCHWARDENS OF SUN-
DERLAND, Respondents.

Assessment of Rate—Appeal under 5 Geo. 1, c. xix. s. 4—Inhabitant.

A Local Act provided for the election of a select vestry of “inhabitants” to levy rates for the maintenance of the church, &c.; and, if any person were aggrieved by any assessment made under the Act, or by any distress or seizure to be made for the same, gave an appeal to the Quarter Sessions, “within three months after such distress made”:—

Held, that there was a right of appeal on assessment, and either before or after distress; and consequently that the Justices, on application for distress warrants

to enforce a rate, could not inquire into the validity of the election of the vestrymen.

And semble, per ERLE, C.J., that an occupier is an "inhabitant," although he does not reside or sleep in the parish.

This was a special case stated by four Justices of the county of Durham, under 20 & 21 Vict. c. 43.

The case showed that at a Petty Sessions, holden at Sunderland on the 28th of May, 1864, the respondents applied to the said Justices to issue distress warrants to levy on the goods of the appellants 7*l.* 0*s.* 7½*d.*, the sum assessed on them under the provisions of a Local Act, 5 Geo. 1, c. xix. intituled "An Act for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth in the county of Durham."

By section 2 of this Act it is provided that for the better raising and ascertaining taxes for finishing a certain church, and keeping it in repair, &c., the major part of the inhabitants of Sunderland, paying scot and lot, shall assemble in the vestry-room and choose "twenty-four substantial and creditable inhabitants of the said parish of Sunderland, each of which shall have a freehold estate, or other estate of inheritance, of the yearly value of 10*l.*, to be vestrymen," &c.

By section 4, if default is made in the payment of the rates made by the above-mentioned vestrymen, four or more Justices of the county of Durham may issue their warrant of distress: and by section 5, "if any person should find him or herself aggrieved by any assessment, to be made by virtue of this Act, or by any distress or seizure to be made for the same, or for the money so to be collected, in such case he or she may appeal to the Justices of the peace to be assembled at any General Quarter Sessions of the peace to be held for the said county of Durham within three months after such distress made," &c.

The rate in question, which was good on the face of it, and duly allowed, professed to have been made by the rector and thirteen of the vestry, convened pursuant to and acting under the Local Act. Nine of the thirteen vestrymen who signed the rate were rate-payers and occupiers in the parish, and carried on their trade or business there; but at the time of their election, and up to the making of the rate, resided and slept in their own private houses in the adjoining parish of Bishopwearmouth. The appellants, who were Quakers, had refused to pay the above rate: and on the application for distress warrants, it was contended for them that the rate was invalid, as nine of the thirteen persons who made it were not properly elected vestrymen under the Act, none of them being resident or sleeping in the parish. For the respondents it was contended, that on that application the Justices had no jurisdiction to inquire into the constitution of the vestry, or the qualification of the vestrymen, or the validity of the rate; and that, if they had, the

Local Act did not require that the vestrymen should be resident or sleep within the parish.

A. Wills, for the appellants.

1st. Generally, if there is an appeal to Quarter Sessions, the Justices, when payment is sought to be enforced, cannot go into the validity of the rate,

Regina v. The Justices of Kingston, El. B. & E. 256;

Ex parte May, 2 B. & S. 426.

But here there is no appeal given till after distress made.

2nd. The vestrymen who did not reside and sleep in the parish were improperly elected, and the rate is bad unless there be a majority of the select vestry present,

Blacket v. Blizzard, 9 B. & C. 851.

The word "inhabitants" is used in contrast to "out-dwellers,"

2 Stephens' Laws of the Clergy, 1327.

Lush, Q.C. (*Prideaux* with him), for the respondents.

The appeal is given to any person aggrieved by the assessment, and may be before distress.

The word "inhabitant" means "occupier,"

Rez v. Barwick, 7 T. R. 33;

Rez v. Hall, 1 B. & C. 123;

Chitty's Statutes by Welsby & Beavan, 1514, n. (2).

Wills, in reply.

ERLE, C.J.—If the objection to the rate be that nine of the thirteen vestrymen who made it did not reside and sleep in the parish, I think that question might have been raised on appeal. I also think that under the Act, a person aggrieved has a right of appeal when the assessment is made: he may appeal either before or after distress made; but if after, he must do so within three months of it. The Justices could not go into the question whether the vestrymen were properly elected; but as to the question whether an "inhabitant" must be a person who sleeps within the parish, I may say I think he need not. In statutes relating to rating, the word has always been construed to mean "occupier," though sleeping in a parish is requisite to constitute an inhabitant for purposes of settlement. If the vestryman is an occupier, with a 10*l.* freehold, it would be sufficient; but it is not necessary to decide it.

BYLES and KEATING, JJ., concurred.

Judgment for the respondents.

C. P. } THE VESTRY OF CHELSEA, Ap-
14 Nov. 1864. } pellants v. KING, Respondent.

Keeping of Pigs within Forty Yards of a Street
—57 Geo. 3, c. xxix., s. 68—25 & 26 Vict.
c. 102, s. 78.

By 57 Geo. 3, c. xxix., s. 68, the keeping of pigs within

forty yards of a street is prohibited within the Bills of Mortality, whether there be a nuisance or not; 25 & 26 Vict. c. 102, s. 73, extends the powers for the "suppression" of nuisances under the former Act to the larger area of the metropolis under the latter Act:—

Held, that the provisions of section 68 of 57 Geo. 3, c. xxix., are not extended beyond the area contemplated by that Act.

Case stated by a magistrate under 20 & 21 Vict. c. 43, from which it appeared that the respondent was summoned before a police magistrate, upon an information charging him with keeping pigs within a distance of forty yards of a street in Chelsea; but it was not shown that any actual nuisance had been caused thereby. The magistrate dismissed the information, and this was an appeal from his decision.

57 Geo. 3, c. xxix. (Local and Personal), entitled "an Act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein," enacts, by—

Section 1.—"That this Act, and the provisions herein contained, shall extend to all streets and public places which are now paved, or which may be hereafter paved, within the cities of London and Westminster and borough of Southwark, and any other parts of the metropolis which are included within the weekly bills of mortality," &c.

Section 68.—"That no person or persons whomsoever at any time or times hereafter shall breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditaments, situate and being in or within forty yards of any street or public place in any parochial or other district, within the jurisdiction of this Act,"—inflicting a penalty of forty shillings, and forfeiture of the swine.

25 & 26 Vict. c. 102 (Metropolis Local Management Acts Amendment Act), enacts, by section 73, that—

"The powers of improving and regulating streets, and for the suppression of nuisances contained in the Act 57 Geo. 3, c. xxix. . . shall, so far as the same is in force, and is not inconsistent with the provisions of the recited Acts and this Act, extend and apply to the metropolis as defined in the firstly recited Act and in this Act, including any unpaved streets, and notwithstanding any exceptions therein contained."

By section 112 the term metropolis is extended to the parishes and places mentioned in schedules A, B and C of 18 & 19 Vict. c. 120; which include Chelsea; and street "shall be deemed to apply to and include the subject matters specified in 18 & 19 Vict. c. 120, s. 250," &c., by which section the word street "shall apply to and include any highway (except the carriage way of any turnpike-road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

Keane, Q. C., argued for the appellants.

No one appeared for the respondent.

ERLE, C. J.—Michael Angelo Taylor's Act, of the 57th year of George the Third, contains a provision that no person shall keep a pig within forty yards of a street, and it extends to the Bills of Mortality of those days. It contains a great quantity of provisions for regulating the streets, and for the prevention of actual nuisances, in that part of it prior to section 68, and then by that section it prohibits the keeping of pigs within forty yards of a street, nuisance or no nuisance. The 25 & 26 Vict. c. 102, extends to a much larger area, embracing districts of a rural nature, and it confers very extensive powers for the suppression of every kind of actually existing nuisance. Does section 73 of the latter Act extend to the Local Board the powers of the very penal clause as to keeping pigs in the Act of George the Third, which is an Act for "improving and regulating the streets, and removing and preventing nuisances," so that the Justice was compelled to convict in this case? I think not. The powers under the Act of George the Third might well have been transferred *in toto*, and nothing could have been easier for the draughtsman of the Local Management Act. But he has taken only a part of those powers; viz., those for improving and regulating the streets and for the "suppression" of nuisances, and not those for paving. The former Act contains powers for "removing and preventing" nuisances, which apply to many things that are inchoate nuisances only; and in the later Act we have a transfer of the powers, not of removing and preventing, but for the "suppression" of nuisances. I think, therefore, that the existence of a pig within the prohibited distance of a street is permissible in an area within the ambit of which are included many rural farmyards. By the definition of the Act the word "street" would apply to the most secluded footpath. The magistrate has most ample powers where there is the slightest nuisance, but here there was no annoyance to anybody, and he was right in thinking he had no power to convict. The keeping of pigs near a street is still prohibited within the Bills of Mortality, but between that area and the limits of the Local Management Act they may be kept unless they cause annoyance.

BYLES, J.—I am of the same opinion. In every written instrument the surrounding circumstances are necessary to its proper construction, and that applies to an Act of Parliament as much as to a will. Here the effect of our decision, if in Mr. Keane's favour, would be, that a man could not keep a pig within forty yards of a footpath in a rural district: and therefore we must see if we are compelled so to decide. We must not strain the Act of George the Third. It contains two sets of clauses, one for the suppression, the other for the prevention of nuisances; and the Act of Victoria only transfers the powers of suppression, i. e., the suppression of existing nuisances. The rational construction is the beneficial one.

KEATING, J.—I entertained considerable doubts whether the Legislature in the latter Act did not mean to transfer all the powers under the 73rd section of the Act of George the Third, and those doubts are not wholly dissipated. However, I am not prepared to dissent from the opinion of the rest of the Court.

Judgment for the respondent.

C. P. } EICHHOLZ v. BANNISTER.
17 Nov. 1864. }

Warranty of Title on Sale of Chattels—Declarations and Conduct of Vendor.

Though there is no warranty of title on the mere sale of chattels, it may be implied from the declaration or conduct of the vendor.

The defendant, a professed dealer in prints, bought some in his shop, and then and there resold them to the plaintiff, who afterwards discovered that they had been stolen, and gave them up to the real owner:—

Held, that the defendant sold as owner, and the plaintiff was entitled to recover from him the price he had paid for them.

Declaration for money had and received. Plea, never indebted.

The plaintiff was a commission agent, and the defendant a job fent dealer, i. e., a dealer in odd lots of prints, &c., at Manchester. The defendant, in the course of his business, had just *bonâ fide* bought a job lot of fents from an old customer, and they were still lying on the scales in his shop, when the plaintiff came in, bought, and paid for them. The defendant sent the goods to the plaintiff's warehouse, with an invoice in the usual form, headed—

“18 April, 1864.

“Mr. Eichholz, bought of Robert Bannister, of &c., dealer in prints, grey fustians, &c.”

A day or two afterwards the plaintiff was informed that the goods in question had been stolen, and the thief convicted, and he accordingly gave them up to the real owner, and brought this action to recover the price he had paid the defendant for them.

At the trial before the Deputy Recorder in the Court of Record of Manchester the plaintiff obtained a verdict for 19l., the full amount of his claim.

Holker subsequently obtained a rule, pursuant to leave reserved, to set this verdict aside, and enter a verdict for the defendant, or a nonsuit, on the ground that there was no warranty of the defendant's title on the sale by him to the plaintiff.

C. Pollock now showed cause.

1st. There was here an implied warranty of title.

By the Roman, French, Scotch, and American law, an implied warranty of title is annexed to every sale of goods,

Addison on Contracts, 224 (5th ed.);

2 Kent's Commentaries, 478;

but, according to the old authorities, there is, by our

law, no warranty of title in the actual contract of sale; and in two old cases, where it was held there was such a warranty, it was assumed that there was an actual affirmation of title,

Crosse v. Gardner, Carth. 90;

Medina v. Stoughton, 1 Ld. Raym. 593.

Then there is a *dictum* of Lee, C.J., that “offering to sell generally is sufficient evidence of offering to sell as owner,”

Ryall v. Rowles, 1 Ves. sen. 348, 352.

And Parke, B., lays it down that, if goods are bought in a shop professedly carried on for the sale of goods, the shopkeeper sells as his own, and warrants title,

Morley v. Attenborough, 3 Exch. 500.

He also cited and commented on,

Noy's Maxims, 209;

2 Bla. Com. 451;

Chapman v. Speller, 14 Q. B. 621;

Sims v. Marryat, 17 Q. B. 281.

2nd. There was a total failure of consideration, and the whole of the money paid may be recovered back.

Holker, in support of the rule.

On the sale of an ascertained chattel there is no warranty of either title or quality, unless there is something, beyond the mere sale, from which it can be implied; and that was not the case here,

Springwell v. Allen, 2 East, 448 n.;

Chandelor v. Lopus, 1 Sm. L. C. 160;

Orinrod v. Huth, 14 M. & W. 651;

Hall v. Conder, 2 C. B. (N. s.) 22;

Broom's *Maxims*, 768 (4th ed.).

There is no difference whether the sale be in a shop or not, for almost all sales are, in some sense, sales as owner. If there was no warranty of title there is no failure of consideration, for the plaintiff has got what he bargained for.

ERLE, C.J., after stating the facts, said—After hearing the case remarkably well argued, I am of opinion that the rule should be discharged. I decide the case in accordance with the current of authorities, which have not been disputed, viz., that if the vendor by word says that he is the owner of a chattel, or by his conduct leads the vendee to suppose that he is, that is part of the contract. The rule is so laid down by Parke, B., in the elaborate judgment in *Morley v. Attenborough*; and he adds, that if articles are sold in a shop professedly carried on for the sale of goods, the title to them is warranted. Here the shopkeeper, by his conduct, affirms that persons buying in his shop buy from the owner, and the plaintiff buys there; and if the defendant was not the owner, a condition of the contract is broken, for which the plaintiff may recover. So much for the particular case. Mr. Holker says there is no warranty of title on the sale of chattels, and there is authority on authority for that position. I adverted to Noy, one of the authors constantly cited on this point, and he says (p. 209):—“If I take the horse of another man, and sell him, and the owner

take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse; and *caveat emptor*." That statement at first sight shocks the understanding; but I take its meaning to be, where I am in possession of a horse, and, without holding myself out as owner, neither affirm nor deny my title to it, and you choose to give me money for it and take it, such as it is, you cannot, if it be reclaimed by a third person, recover the money you have so paid. So in *Morley v. Allenborough*, a pawnbroker selling forfeited pledges gives notice to the vendee of what it is he sells, and that he knows nothing absolutely about the title; and consequently, if the real owner comes forward and recovers the article, the pawnbroker has a right to keep his money. So in *Chapman v. Speller* the seller merely assigned the right he had purchased of the sheriff; and in *Hall v. Conder* the defendant did not profess to sell a good and indefeasible patent right. But in almost all the transactions of sale in ordinary life, the vendor, exercising the highest right of dominion, holds himself out as owner, and leads the purchaser to believe that he is so: and that is the case of a seller, selling as his own, put by Blackstone. Noy's maxim is merely a dictum, and has always been so treated. This is another case which shows the wisdom of Lord Campbell's remark in *Sims v. Marryat*, that if by the law of England the maxim of *caveat emptor* applies on a sale of personal property, the exceptions have well-nigh eaten up the rule.

BYLES, J.—I am of the same opinion. It has been stated over and over again, that a mere sale of chattels does not involve a warranty of title; but that is subject to the exception, that if by his declarations, or conduct, or by surrounding circumstances, the vendor represents the goods as his own, there is an implied warranty.

KEATING, J.—I am of the same opinion. Whether this case be an exception to the general rule or not, there was here what amounted to a warranty of title. Indeed it would be difficult to find any case in which the facts point more concurrently to a warranty. A sale in a shop is undoubtedly a circumstance which leads one to imply a warranty; but I was certainly struck by Mr. Holker's argument, that the distinction in the case of goods sold in a shop, and goods sold elsewhere, would, under certain circumstances, be slight; or it may be that there would be no distinction between the two cases. But it is not necessary to decide that now.

Rule discharged.

C. P. } ORAM, Appellant, v. COLK,
18 Nov. 1864. } Respondent.

REGISTRATION APPEAL.

Notice of Objection—6 Vict. c. 18, Sch. B, No. 11.

Where there are two lists for a borough, the addition

to the signature of the objector in 6 Vict. c. 18, sch. B, No. 11, though it must specify in which of the lists his name appears, is not invalidated by addition of the name of the borough to that description.

This was an appeal from a decision of the revising barrister for the borough of Devonport. The borough of Devonport consists of the parish of Stoke Damerel and the township of East Stonehouse.

The list stuck up by the churchwardens and overseers of Stoke Damerel was headed: "List of persons entitled to vote for the borough of Devonport in respect of property occupied within the parish of Stoke Damerel." The list stuck up by the churchwardens and overseers of East Stonehouse was headed: "List of persons entitled to vote for the borough of Devonport in respect of property within the township of East Stonehouse."

The respondent had signed the notice of objection as follows: "E. W. Cole, 69, Durnford Street, on the list of voters for the borough of Devonport and township of East Stonehouse." It was objected to this notice that it did not appear from it on what list the objector's name was to be found, and moreover that there was in fact no such list as that described in the notice of objection. There is no other Durnford Street in the borough of Devonport than the Durnford Street in which the said E. W. Cole lives, and that is within the township of East Stonehouse.

The barrister disallowed the objection, holding the notice sufficient.

Karslake, Q.C., for the appellant.

The notice does not state distinctly any list existing in Devonport,

Eidsforth v. Farrer, 4 C. B. 9;

Crouther v. Bradney, 3 N. R. 129; 15 C. B. (N.S.) 536.

Montague Smith, Q.C., for the respondent.

ERLE, C.J.—If there is more than one list of voters, it has been decided that the objector must define which of the lists the party objected to must look at to find the name of the objector. The objector has referred him to the list for the township of East Stonehouse.

BYLES, and KEATING, JJ., concurred.

Judgment for respondent.

C. P. } GAYDON, Appellant, v.
18 Nov. 1864. } BANCROFT, Respondent.

REGISTRATION APPEAL.

Right of Freeman to Vote—2 Will. 4, c. 45, s. 32.

The exception in 32nd section of 2 Will. 4, "That no person shall be entitled to vote as a freeman in respect of birth, unless his right be originally derived from or

through some person who was a freeman, or entitled to be admitted a freeman, before the 1st of March, 1831," reserves the right continuously, and not for one descent only; and a freeman can derive this right through his grandfather, his father never having been admitted a freeman.

This was a consolidated appeal from the decision of the revising barrister of the borough of Barnstaple. The facts proved were as follows:—In the borough of Barnstaple there is a body of freemen. The sons of these freemen are entitled on proving their father's marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen of the borough, but they can claim from or through no other relation than, and in no other way than that described.

The said William Saunders was duly admitted as a freeman (by right of his birthright from his father) of the said borough, on the 31st of July, 1856; his father was admitted also by right of birth on the 2nd of May, 1831, having only come of age on the 4th of April of that year. The grandfather was admitted by right of birth on the 14th of October, 1810. On this state of facts it was contended on the part of the objectors, that as the said William Saunders derived his right to be admitted as a freeman of the said borough through his father, from and through whom alone he could claim; and as it was necessary, by the 32nd section of the Reform Act, that the father, to give him the right claimed, namely, to be on the list of freemen voting for the borough, should have been admitted a freeman, or have been entitled to have been admitted as a freeman, previously to the 1st day of March, 1831, and that as he (the father) was not admitted till the 2nd day of May, 1831, nor entitled to be admitted till he came of age on the 4th of April, 1831, his right to be placed on the list of freemen voting for that borough could not be sustained.

On the other side it was contended, in support of the vote, that, although the father could not have been admitted as a freeman till he came of age, that he had an inchoate right to be so admitted previously to the 1st of March, 1831, which was perfected on his coming of age, and that there was sufficient to satisfy the proviso of the 32nd section of the Reform Act, and to sustain the vote.

The revising barrister held that the said W. Saunders originally derived his right from or through his father, and that there was no one, from or through whom he thus derived his right, who was a freeman, or entitled to be a freeman previously to the 1st of March, 1831, and that the vote could not be sustained, and he was struck out of the list.

Cooke, Q. C., for the appellant.

If the 32nd section of the Act had stopped at the end of the first proviso, there is no doubt that William Saunders would be entitled to vote. Within the meaning of the second proviso there is no doubt that the

appellant derived from his grandfather and through his father. He cited,

Gale v. Chubb, 4 C. B. 41;

Elliott on Qualifications and Registrations, 214 n. a (2nd ed.);

5 & 6 Will. 4, c. 76, ss. 4, 5.

Dowdeswell, for the respondent.

The claimant cannot refer back further than his father, and as his father had not been admitted previous to the 1st of March, 1831, the right was gone.

ERLE, C.J.—The revising barrister was wrong. The question is, whether the right of voting of freemen by birth was reserved by the Reform Act for one descent only or continuously? The Legislature intended to preserve it continuously. All freemen were excluded by this section who had been created since the 1st of March, 1831, unless they gained their freedom by birth or servitude. But the right of voting had been reserved to those freemen in respect of birth, if their right had been originally derived from or through some person who was a freeman, or entitled to be admitted a freeman, on the 1st of March, 1831. The present claimant derived his right from his grandfather, who became entitled in April, 1810, and through his father, who became entitled on the 4th of April, 1831, and was admitted by right of birth on the 2nd of May in that year. This proviso is to give a lineal right. As freedom by birth or servitude is retained by this Act, it is an additional reason to show that this right is preserved continuously.

BYLES and KEATING, JJ., concurred.

Judgment for the appellant.

C. P. } BAKER, Appellant.
19 Nov. 1864. } LOCKE, Respondent.

REGISTRATION APPEAL.

Disqualification by non-payment of Poor-rate—
2 Will. 4, c. 45, s. 27—*Valid Poor-rate—*43
Eliz. c. 2, s. 1.

Where there were four overseers in a parish, two churchwardens, and an assistant overseer, the assistant overseer had signed the poor-rate to make the majority required by the statute of Eliz. :—

Held, that an occupier having refused to pay the rate was not entitled to vote under the 2 Will. 4, c. 45, s. 27.

This was an appeal from the decision of the revising barrister for Taunton.

The facts of the case are, the appellant occupied premises of sufficient value and for a sufficient time to entitle him to a vote for the Borough of Taunton under 2 Will. 4, c. 45, s. 27, subject to the following question as to his non-payment of rates.

A poor-rate was made and signed by an overseer of the parish and two churchwardens, and by the assistant

overseer. The rate was allowed and confirmed at Taunton by two magistrates, and was duly published the following day. The appellant was rated in respect of premises he occupied, but refused to pay, and had not paid the rate. The rate was not appealed against, and the time for appeal had expired. The rate was generally paid.

There are four overseers appointed for the said parish.

The assistant-overseer was duly appointed under 59 Geo. 3, c. 12, s. 7, and 7 & 8 Vict. c. 101, s. 61.

The assistant-overseer was duly appointed collector of rates by the board of guardians. It was objected on behalf of the appellant that the said rate was void, on the ground that it was not signed by a majority of the parish officers, and that consequently its non-payment by the appellant did not invalidate his right to be retained on the list of voters; and the revising barrister expunged his name from the list of voters.

Hannen and Underdown, for the appellant, contended that the rate was invalid. They cited,

59 Geo. 3, c. 12, s. 7;

7 & 8 Vict. c. 101, ss. 61, 62;

Glen on Overseers, 3;

48 Eliz. c. 22, s. 1;

Bennett v. Edwards, 8 B. & C. 782;

Beard on Overseers, 393;

King v. Fordham, 11 Ad. & E. 73;

Fox v. Overseers of Shaston, St. Peter's, Shaftesbury, 2 Lut. 97.

Prideaux, for the respondent.

Regina v. Watts, 7 Ad. & E. 461;

Poyntz v. Atwood, 6 C. B. 33;

Poynter v. Adams, 1 Hopwood & Philbrick, 30;

Shipley v. Surridge, 11 M. & W. 503.

ERLE, C.J.—I am of opinion that the revising barrister was right, and that the claimant was not qualified to vote on account of non-payment of the poor-rate. The Legislature makes the qualification to depend, amongst other things, on whether or not the poor-rate has been paid. The rate had not been paid by the appellant. He is therefore apparently disqualified from voting. The rate, on the face of it, is valid. It purports to be signed by the two churchwardens, two overseers, and one assistant-overseer. The statute of Eliz. obliges the rate to be signed by a majority of the parish officers. The point in this case is, that one of the parish-officers is an assistant-overseer. I cannot give the same opinion as that laid down by the authors of the treatises on overseers, that an assistant-overseer cannot join in signing a rate. It appears that the assistant-overseer has the same rights as the overseers, except as to collection of rates. We have also this fact, that he is appointed by the vestry, and that he was appointed to be an assistant-overseer in performance of all the duties of an overseer, except the collection of rates. Therefore, both by the statute

and appointment, he has the same rights as the overseers. It is made a principal point that the assistant-overseer is to obey the overseers. But it is not sustained by the facts.

It does not follow that because he is an assistant-overseer he is the servant of the overseers, any more than a deputy-recorder, who is an original officer, is the servant of a recorder. The appellant could have ascertained by appeal whether he ought to have paid this rate; and pending the issue he ought to have paid the rate, which would have entitled him to his vote; and if he succeeded in his appeal, the money he had paid would have been allowed him in a subsequent rate. The Court would be setting a bad example, if they said that a person might vote when he withheld payment of the poor-rates, which the Legislature says he must pay before he has it. Under the circumstances, I am not sure that he could have successfully appealed against the rate; but we have not to decide that point now.

BYLES, J.—I am of the same opinion: the rate is good on the face of it. 59 Geo. 3, c. 12, s. 7, creates the office of assistant-overseer, and says nothing about obedience to the overseer. He is to perform all the duties of overseer, except collecting the rates. He is invested with the full power of an overseer: he is not a servant, but a coadjutor and fellow-officer of the overseers. There would be great difficulty, even on appeal from this rate, in contending that it was not a good rate.

KEATING, J.—It does not appear from the case that the assistant-overseer disobeyed the overseers.

Judgment for the respondent.

C. P. } HARRISON v. BLACKBURN.
21 Nov. 1864.

Coram—ERLE, C.J., BYLES and KEATING, JJ.

Trespass, Possession sufficient to maintain — Bill of Sale—Things "ejusdem generis"—Actual Entry.

B, tenant from year to year of an inn, by bill of sale, in 1861, assigned all the household goods, furniture, stock-in-trade, and all other household effects, and all other goods, chattels, and effects then being, or which should thereafter be, on the premises, and all other his personal estate whatsoever, to the plaintiff, as security for a debt of 60l.

In 1863, B's landlords distrained for two years' rent. B surrendered to his landlords, and they immediately let the inn to the defendant. The plaintiff, his debt being unpaid, demanded possession from the defendant, and on refusal brought trespass:—

Held, 1st. That the bill of sale passed no interest in the term to the plaintiff. 2nd. That, even if it did, plaintiff could not maintain trespass against defendant without actual entry.

This was a special case stated by an arbitrator, to whom the case was referred to find the questions of fact, leaving the questions of law to the Court.

Declaration in trespass for breaking and entering a messuage, dwelling-house, and premises of the plaintiff, called the Bull's Head Inn, at Bedford, &c., and injury to the plaintiff's goodwill of the business.

Pleas—Not Guilty, and a denial of the plaintiff's property.

It appeared from the case, that, on the 20th of December, 1861, one Battersby, the then landlord of the Bull's Head, and tenant from year to year thereof, being indebted to the plaintiff, a brewer, in the sum of 60*l.* for ale supplied, executed a bill of sale by way of security to the plaintiff for the repayment of that sum.

By this instrument the said Battersby sold and assigned to the plaintiff "all and every the household goods and furniture, stock in trade, and all other household effects whatsoever, and all other goods, chattels, and effects then being, or which should thereafter be, in, upon, or about the messuage or dwelling-house and premises occupied by the said Battersby, and known as the Bull's Head, situated in Bedford, and all other the personal estate whatsoever of or to which the said Battersby then was and from time to time, and at all times thereafter, . . . so long as any money should remain due and payable to the said Battersby," &c. After default the plaintiff to have power to sell and dispose of the said premises. Ordinary trusts to pay expenses, repay the 60*l.*, and pay surplus to Battersby.

On the 21st of July, 1863, the Bridgewater trustees, the owners in fee of the Bull's Head, distrained for two years' rent, all the moveables were sold, and found insufficient to cover the rent.

On the 27th of July, 1863, Battersby surrendered the premises to the Bridgewater trustees, who let the house the same day to the defendant. The defendant then took possession, and had held it ever since. During the defendant's possession, the plaintiff, the debt not having been paid, demanded possession from him and on a refusal brought the present action of trespass. The goodwill was worth nothing.

The question for the opinion of the Court was, whether on the true construction of the deed and the facts found by the case, the plaintiff was entitled to succeed in his action of trespass.

Edward James, Q.C. (*Baylis* with him), for the plaintiff, argued that the bill of sale passed an interest in the term to the plaintiff, so as to entitle him to maintain trespass.

The intention of the deed depends not on the facts, but on the belief of the parties at the time they made it. No matter whether the term and the goodwill of the house were worth something or nothing. The plaintiff may have considered they would be an addi-

tional security to him. The conveyance is in the fullest conceivable terms. "All other the personal estate whatsoever," must refer to the term, or to nothing.

He cited,

Ringer v. Cann, 3 M. & W. 343.

No question can be raised as to whether there was sufficient entry by the plaintiff for him to maintain trespass. That is outside the case.

Manisty, Q.C., for the defendant.

1st. On the facts found by the case, even if the term passed under the deed, the plaintiff never took possession by entry so as to be entitled to bring trespass.

[*ERLE, C.J.*, referred to

Cooper v. Willomatt, 1 C. B. 672.]

[*BYLES, J.*—The old action of ejectment was only an action of trespass with a specific remedy. Will not trespass lie whenever ejectment will ?]

No.

[*KEATING, J.*—Entry was admitted in the old action of ejectment.]

In a mortgage the estate passes to the mortgagee, but he cannot maintain trespass,

Litchfield v. Ready, 5 Exch. 939 ;

Turner v. Cameron's Coalbrook Steam Coal Company, 5 Exch. 932 ;

Bullen and Leake's Pleadings, 359 n. (2nd ed.).

Actual entry is necessary.

[*ERLE, C.J.*—Is he not in actual possession in law ?]

No. This is a chattel real not a chattel personal.

[*ERLE, C.J.*, cited,

Williams v. Bosanquet, 1 B. & B. 238.]

Yes, but that is with regard to liability on covenants. See *Patteson, J.*'s, remarks on that case in

Ryan v. Clark, 14 Q. B. 73.

All the cases are collected in

Roscoe on Evidence, 608 (10th ed.).

2nd. This deed did not assign the term. There is nothing to show the slightest intention to convey more than the ordinary chattels. The sweeping sentence at the end is incomplete and meaningless. There was no apparent intention for the plaintiff to take the house—no trust to pay the rent.

Edward James, Q.C., replied.

ERLE, C.J.—Our judgment must be for the defendant. First, as to the bill of sale. The context shows that by "chattels" the parties meant chattels in the ordinary sense of the word, not "chattels real." The sweeping words which follow are properly construed as being confined to things "*ejusdem generis*," with those which have gone before. If the plaintiff meant to take the term, he would have taken care that it should be expressly assigned. Besides, in the trusts which follow there is no trust for payment of rent, which would have been reasonably expected if

the term had been assigned. In *Ringer v. Cann*, the assignment was for the benefit of creditors in general, and there was such a trust.

Secondly, trespass cannot be maintained without actual entry. A conventional meaning is given to the word "entry" in the case of liability on covenants; but Patteson, J., shows, in *Ryan v. Clark*, that such entry is insufficient to maintain trespass.

BYLES, J.—I am of the same opinion on both points. The words "all personal estate" would include a term for years, but subject to the rule, that the intentions of the parties must be collected from the whole deed. The sweeping words only carry things "*ejusdem generis*." (See *Rawlings v. Jennings*, 13 Ves. 39.) Here there was no trust, as in *Ringer v. Cann*, for the payment of rent. As to the entry, my brother Keating pointed out the distinction between trespass and ejectment. Trespass cannot be maintained without actual entry.

KEATING, J.—So far as I have heard the case I agree with the rest of the Court on both points.

Judgment for the defendant.

Ex.
23, 30 JAN. 1864.

THE COMMISSIONERS OF IN-
LAND REVENUE v. THE FUR-
NESS RAILWAY COMPANY.

13 & 14 Vict. c. 97 (*Stamp Duty Act*)—*Con- sideration for Deed of Transfer—New Pre- ferential Stock.*

Where the U Company sold their undertakings to the F Company, and the deed of transfer recited, *inter alia*, that the F Company had created preferential stock, and allotted it to the then shareholders of the U Company in lieu of that which they held in the former undertaking:—

Held, that such preferential stock was liable to *ad valorem* duty as part of the consideration or purchase-money for the transfer, and might be estimated at its market value at the date of the deed.

CASE stated under the 13 & 14 Vict. c. 97. The facts are fully set out in the judgment.

Mellish, Q.C., (J. Davison with him), for the company, cited,

Chandos v. Commissioners of Inland Revenue, 6 Exch. 464;

Stevens v. Keating, 2 Exch. 772;

Horsfall v. Hey, 2 Exch. 778;

Re Earl Mount Edgcumbe, 8 Exch. 376.

The Attorney-General (The Solicitor-General and F. Bevan with him), *contra*.

The following Acts were referred to:—

55 Geo. 3, c. 184;

13 & 14 Vict. c. 97;

16 & 17 Vict. c. 59;

17 & 18 Vict. c. 83.

Cur. adv. vult.

30 JAN. 1864.

POLLOCK, C.B., now delivered the judgment of the Court (*Pollock, C.B., Martin and Pigott, BB.*)—

This is a case stated by the Commissioners of Inland Revenue, under the 13 & 14 Vict. c. 97; and the question is, whether a deed of the 4th of August, 1863, between the Furness and the Ulverstone Railway Companies, is chargeable with *ad valorem* duty in respect of a sum of 390,380*l.*, and two other sums making altogether 529,099*l.* 4*s.* 2*d.* It was correctly admitted on behalf of the Furness Company, that, with respect to the two latter sums, *ad valorem* duty was legally chargeable, and the argument was confined to the sum of 390,380*l.* This sum represents the value of 298,000*l.* preference stock of the Furness Company, at the price of 131*l.* per 100*l.* share, being its average selling price on the day of the date of the deed. Some attention is necessary to collect from the deed what is the transaction between the two companies.

According to the 49th section of the Ulverstone and Lancaster Railway Act, 1858, this deed is to state fully and truly the consideration for the deed. It is to be collected from the recitals of the deed that prior to the year 1858 they were two railway companies, one called the Ulverstone, and the other the Furness Company; and by the Act of 1858 it was enacted that the Ulverstone Company might sell, and the Furness company might buy, the works or undertakings of the Ulverstone Company upon such terms as might be mutually agreed on by an agreement to be made between the two companies, which agreement was to be submitted to the Board of Trade for their approval; and by section 49 it was enacted that the transfer should be evidenced by a deed of transfer duly stamped, wherein the full consideration for the deed of transfer should be fully and truly stated. There can be no doubt that this clause was put into the Act of Parliament to prevent a transaction being done merely by the Act of Parliament between the parties, the respondents losing the stamp duty. The deed further recited the agreement dated the 26th of May, 1862, and that it was approved by the Board of Trade; and it is to the effect that the Ulverstone Company had issued shares to the amount of 298,000*l.*, and were indebted in 138,719*l.* 4*s.* 2*d.*, and that it was agreed that the Ulverstone Company should sell, and the Furness Company buy, the whole of the undertakings of the Ulverstone Company, subject to all the debts of the Ulverstone Company; and that the Furness Company should create preferential stock to the nominal amount of 298,000*l.*, which should be allotted to the then shareholders of the Ulverstone Company as fully paid-up stock, with a perpetual preferential dividend of 6*l.* per cent. per annum; but this preferential stock should not confer any right of voting at any general

meeting of the Furness Company. That the Furness Company should deliver to the Ulverstone Company certificates of the preferential stock, to be distributed by them amongst their shareholders, and that they in exchange would procure and cancel and deliver to the Furness Company the original share certificates of the Ulverstone Company, and that thereupon the Ulverstone Company's capital of 298,000*l.* should be extinguished, and the Furness Company's preferential stock of 298,000*l.* substituted for it. This is the agreement cited in the deed. The deed then, amongst other things, recites that the preferential stock of the amount of 298,000*l.* had been created and allotted to the shareholders of the Ulverstone Company, and that the certificates thereof had been duly made out, delivered, and distributed, and that both companies had performed, on their respective parts, everything to be by them performed by virtue of the said agreement of 26th of May, 1862. The deed then witnessed that in consideration of the agreement the whole undertaking of the Ulverstone Company, subject to their debts, was, by virtue of the Act of 1858, transferred to and vested in the Furness Company, absolutely for ever, and that this deed was made and executed in consideration of the proviso in section 49 of the Act of 1858. The result of the transaction is, that the Ulverstone Company was substantially a body of shareholders holding stock to a nominal amount of 298,000*l.* odd, owing debts to the amount of 138,719*l.* 4*s.* 2*d.*, and they agreed to sell their undertakings to the Furness Company for new preferential shares of their company to the same nominal amount, paying a perpetual preferential dividend of 6*l.* per cent. per annum, the Furness Company also taking upon themselves the payment of the debts of the Ulverstone Company. Before the deed was executed, the new preferential shares had been created, and allotted, and distributed amongst the shareholders of the Ulverstone Company, and were being sold in the market on the day of the date of the deed, at an average price of 131*l.* per share, or, in other words, the shares were 31*l.* premium. This is not stated in the deed, but is stated as part of the case by the Commissioners, and the question is, whether *ad valorem* duty is payable upon the value of the preferential stock by virtue of the statute 13 & 14 Vict. c. 97, schedule tit., "Conveyance." By it the conveyance upon the sale of any property, when the consideration money therein expressed is in pounds sterling, is subject to a certain rate of duty, and the schedule then directs that when such consideration shall consist either wholly or in part of stock, the value thereof shall be ascertained as in the next paragraph mentioned, and shall be truly expressed and set forth in words at length in every such deed, and such value shall be deemed to be the purchase or consideration money or part of it, as the case may be, in respect whereof an *ad valorem* duty may be charged, and one of the modes of ascertaining the value is that adopted by the Commissioners in this instance,—namely, the

average selling price of the stock on the day of the date of the deed. We think it is only necessary to understand the transaction to see that it directly falls within the words of the statute. The vendors were the corporation called the Ulverstone Company, and they were a number of shareholders holding stock to the amount of 298,000*l.*, upon which they were entitled to dividends, if the undertaking earned them, and they agreed to sell their undertakings for 298,000*l.* perpetual preferential shares of the Furness Company, paying a perpetual preferential dividend of 6*l.* per cent. We think it is clear that part of the consideration for the sale was stock. It was argued that it was not stock within the meaning of the second paragraph in the schedule tit. "Conveyance," because stock of some third company was meant by that. We think there are no grounds for so contending. If the Furness Company had occasion to buy land, and promised to pay the price by bills, we think such an agreement would be within the statute. We are clearly of opinion that such a deed as is directed by the 49th section ought to be stamped as the Commissioners determined. The Commissioners might have said before they stamped it, we insist upon your putting into it the real and true consideration. But we think their object is only to obtain the revenue, and that it may be considered rather as directory than absolutely necessary to put into the deed the amount that the Furness Railway Company are willing to pay for the duty.

Judgment for the Crown.

Ex. { HARRISON v. THE GREAT
25 MAY, 13 JUNE, 1864. { NORTHERN RAILWAY
COMPANY.

*Obligation on a Company to Maintain their
Delph or Drain Banks in Proper Condition.*

The defendants, a railway company, were in possession of a delph or drain which flowed through some lands of the plaintiff into the river Witham. The defendants were under a statutory obligation to keep the banks of this delph in proper condition. The river Witham was under the management of certain commissioners, whose duty it was to have the channel of the river kept of a certain width and depth. Through the neglect of these commissioners this was not done, and the flow of the river being checked, the waters of the delph became penned up and forced back by the waters of the Witham. During some heavy floods the waters of the delph broke the bank and flooded the plaintiff's land. In an action brought to recover damages for this injury, the jury found that the accident had been caused by the negligence of the commissioners, but that it would not have happened if the banks of the delph had been in a proper state of repair:—

Held, that the defendants were liable.

This was an action against the Great Northern

Railway Company for their negligence in not keeping in proper repair the banks of a certain drain or delph which ran through the grounds of the plaintiff, and which had burst its banks and inflicted considerable damage on his property.

This ditch or delph, which runs into the river Witham at Horsleydeep, had been constructed by a company which had been formed for the purpose of executing certain drainage works in Lincolnshire, and by the 10 Geo. 4, c. 123 (local and personal), the obligation of keeping the banks of the delph in repair was cast upon this company. This responsibility was however transferred to the Great Northern Railway Company by the Great Northern Railway Act, 9 & 10 Vict. c. 71 (local and personal). Under this enactment the Great Northern Railway Company were required to take a lease of the drainage company's property for 999 years, and to perform all the duties formerly cast upon that company.

The river Witham, into which the delph flowed, was in certain parts under the management of commissioners, whose duty it was to keep the bed of the river properly cleaned. This duty was neglected, and by reason of this neglect the free flow of the waters in the delph was impeded, and during some heavy floods, in the spring of 1864, these waters broke the bank and overflowed the adjacent lands, some of which belonged to the plaintiff. An action was then brought against the defendants by the plaintiff, on the ground that at the time of the accident the banks of the delph were not in a proper state of repair.

The case was tried at the Lincoln Spring Assizes, before Byles, J., when the jury found that the accident was caused by the neglect of the commissioners in not keeping the river in a proper condition, but that the bank of the delph would not have given way if it had been in a proper state of repair. On this finding, a verdict was entered for the plaintiffs.

A rule *nisi* (pursuant to leave reserved) was obtained by *Bovill, Q.C.*, to set aside this verdict and enter the verdict for the defendants, or to reduce the damages to a nominal sum.

25 MAY, 1864.

Field, Q.C. (Macaulay, Q.C., with him), showed cause against the rule.

Bovill, Q.C. (Boden, Q.C., and Beasley with him), in support of the rule.

Cur. adv. vult.

13 JUNE, 1864.

POLLOCK, C.B., now delivered the judgment of the Court :—

In this case the defendants, for their own profit, as owners of a navigation, had undertaken the burden of maintaining a delph or cut for the carrying off of certain water. This delph they have maintained in an improper manner, that is to say, improper in the sense that the banks of it were not sufficient to resist the water they could contain, such insufficiency being

owing to bad construction. It was not shown merely that they were insufficient to hold the water that would come there by the wrongful act of others, which I am about to name, but that they were insufficient in relation to the delph. The outlet of the delph was into a certain channel, the commissioners for the management of which were bound to keep it of certain dimensions. They did not, and by reason thereof, as found by the jury, the water in the delph was penned back; possibly even water flowed into it. Consequently the water in the delph rose, and, owing to its rising and to the defective construction of the banks, they gave way, and the plaintiff's land was inundated and damaged. The jury further found that, but for the wrongful conduct of the commissioners, this mischief would not have happened. The defect, however, of the channel into which the delph had its outlet was not of recent occurrence, but of long standing, and on former occasions the water had by the same cause been penned up in the delph. Further there was nothing in the weather of so extraordinary a character that the defendants were not bound to anticipate it. The storm, though unusual and extraordinary in a sense, yet, as happening once in a year or in a few years, was not unusual. It was argued for the plaintiff that the defendants were insurers—that is, that they, for their purposes, had the delph, and brought the water there, and were bound to restrain it. It is not necessary to decide this, as we think that they are liable on other grounds. They are bound to maintain a sufficient cut or delph. The sufficiency of a cut depends on its depth, width, fall, and outlet as compared with the water likely to be in it. Now in this case the cut was not sufficient to maintain the water which was likely to be in it, owing to the condition of the outlet. If no one was under any obligation in relation to that outlet, it is clear that that was insufficient, and that the defendants would be responsible. Are they less so because there is on others as to the outlet an obligation which is not performed? We think not. It is not the case of a sudden wrong done by others in stopping up the outlet. It is a permanent long continuing state of things which it was the duty of the defendants, to obviate or guard against. Suppose A has an outlet through the lands of B and C, and C stops up the outlet into his land from B's. A, nevertheless knowing this, pours water into the drain and damages B, surely A is liable to B! The present law may be tested thus :—Suppose the plaintiff sued the river commissioners, could they not truly say they had not caused it? They would say the proximate and immediate cause was the defective bank, and it was so; and therefore the defendants are liable, and the plaintiff is entitled to judgment. The rule will, therefore, be discharged.

Rule discharged.

Ex. } EVANS and Another v. JONES
16 Nov. 1864. } and Others.

Deed for benefit of Creditors—Title of Trustees against Execution Creditors—Statute 13 Eliz. c. 5.

A deed, executed at 10 A.M., on December 3rd, in pursuance of a resolution passed at a meeting of creditors on November 25th, whereby a debtor assigns all his property to trustees for the benefit of his creditors, "being such persons as would have been entitled to rank as creditors in bankruptcy if he had been adjudicated bankrupt on a petition filed November 25th," passes the property to the trustees, as against a judgment-creditor who signs judgment and issues execution at 11:30 A.M. on December 3rd, and is not void for fraud under 13 Eliz. c. 5.

This was a special case stated under the provisions of the Common Law Procedure Act of 1852, to determine the title to the proceeds of certain goods, formerly belonging to one William Buss, as between the plaintiffs, who were trustees under a deed executed by him for the benefit of his creditors, and the defendants who were execution-creditors, under the following circumstances:—

On the 19th of November, 1862, the defendants issued two writs of summons against Buss under the Summary Procedure on Bills of Exchange Act. Judgments were signed in these actions on the 3rd of December, at 11:30 A.M. The defendants immediately issued execution, and the sheriff's officer seized the goods at 12 o'clock, and they were sold.

In the meanwhile, on the 25th of November, a meeting of the creditors of Buss was held, when a resolution was passed that Buss should execute a deed for the benefit of his creditors. In pursuance of this resolution, on the 3rd of December, at 10 o'clock A.M., Buss executed a deed, whereby, in consideration of a release, he assigned all his property to the plaintiffs as trustees upon trust, after paying the expenses therein mentioned, "to pay and discharge rateably, and without any preference, all the debts due and owing from the said Buss to the said creditors, being such persons as would have been entitled to rank as creditors in bankruptcy if he had been adjudicated bankrupt on a petition filed on the 25th of November, 1862."

A person had been put in possession of the goods in anticipation of the deed being executed, and immediately on the execution thereof, on the 3rd of December, and before the sheriff's officer seized, he was directed to hold possession for the trustees under the deed. The deed was, subsequently, registered under the 194th section of the Bankruptcy Act of 1861, so as to be receivable in evidence.

Hansen (with him, Lord), for the plaintiffs, argued, that independently of the Bankruptcy Act, the deed was

good at Common Law, and its operation was to pass the property to the trustees. He referred to statute 19 & 20 Vict. c. 97, s. 1.

Hayes, Serjt. (with him, Thrupp), for the defendants, argued, that the judgment-creditors were judgment-creditors at the time of the execution of the deed, that the deed was for the benefit only of those creditors who were creditors when the meeting took place, that the defendants were excluded from the benefit of the deed, and therefore that the deed was a fraud under 13 Eliz. c. 5.

[POLLOCK, C.B.—How are the defendants excluded?]

Our debt is, since the 25th of November, converted into a judgment debt, and we become creditors for costs, for which we should be entitled to prove in bankruptcy under the Act of 1849. But this deed is only for the benefit of those who were creditors upon the 25th of November.

[BRAMWELL, B.—How is the deed a fraud?]

We are delayed and defeated. The assets are distributed amongst the other creditors. This is not a fair deed, as in

Pickstock v. Lyster, 3 M. & S. 371.

He also cited,

Owen v. Body, 5 Ad. & E. 28.

Hannen, in reply, referred to

Twyne's Case, 3 Rep. 80 B, as to fraud.

This deed does not interfere with the defendants' rights. Suppose Buss had been adjudicated bankrupt on the 3rd of December on a petition filed on the 25th of November, the defendants were "persons entitled to rank as creditors" for their debt, and all the accretions thereto. This is not like a voluntary deed. It is for valuable consideration,—viz., a release.

POLLOCK, C.B.—The question is, whether the execution creditors were entitled to hold as against the trustees under the deed. I think not. The deed is a good deed to pass the property at Common Law, and the requisites of the Bankruptcy Act of 1861, as to registration, have been complied with. I think the deed is not void under 13 Eliz. c. 5, and that there was no intention to exclude any of the creditors from the benefit of the deed.

BRAMWELL, B.—This was a good deed, unless avoided by the statute of Elizabeth. Without saying an actual dishonest intention is necessary to constitute a fraud under that Act, I think there must be something in the deed untrue in fact, or something impossible to be executed, as in *Owen v. Body*. There is no pretence for saying this deed is fraudulent.

CHANNELL, B.—I agree that this deed is not void under the statute of Elizabeth. I do not see why the defendants, if Buss had been adjudicated a bankrupt on the 3rd of December on a petition filed on the 25th of November, should not have proved for costs.

PIGOTT, B.—I also think the defendants might have proved for costs. I think there was no contrivance to defraud the defendants of their costs, and that the deed was not void under the statute of Elizabeth.

Judgment for the plaintiffs.

Adm. } THE MARIE JOSEPH.
1, 2 AUG., 8 NOV. 1864. }

Before the Right Honourable DR. LUSHINGTON.

Bill of Lading—Fraudulent Possession—Stop-page in transitu.

A bonâ fide indorsee of a bill of lading for valuable consideration cannot defeat the right of the owner of the goods to stop in transitu, if the indorsement has been made by a person who obtained possession of the bill of lading by fraud.

This was an action instituted by Messrs. Pease & Co., holders of a bill of lading against "The Marie Joseph," for the non-delivery to them of their cargo by the master. The circumstances were as follow :—

Early in the month of February, 1864, Walter Stericker of Kingston-upon-Hull, as agent for Messrs. Maxwell & Dreossi, of Bordeaux, in France, agreed with Messrs. Scarborough & Tadman, of Kingston-upon-Hull, for the sale to them of sixty tons of linseed-cake, they paying for the same by their acceptance at three months' date. The linseed-cake was accordingly, on the 11th of February, shipped at Bordeaux, on board "The Marie Joseph," owned and commanded by Jean Marie Gloahac. Messrs. Maxwell & Dreossi indorsed the bill of lading for the same unto order or assigns, and drew a bill of exchange for the price of the linseed-cake on Scarborough & Tadman, and forwarded both the bill of lading and the bill of exchange to Stericker, their agent at Hull. On the 16th of February, 1864, Stericker brought both the bill of lading and the bill of exchange, and also a policy of insurance upon the linseed-cake, to the office of Scarborough & Tadman. Mr. Scarborough, one of the members of the firm, accepted the bill of exchange, and thereupon Stericker delivered to him the bill of lading duly endorsed by Maxwell & Dreossi, together with the policy of insurance. Some questions then arose as to the implication of the firm of Scarborough and Tadman in the affairs of one David Moor, which affairs, since the preceding Christmas, had been rumoured to be embarrassed; and the result was that Scarborough handed back the bill of lading and the policy to Stericker, and Stericker signed and gave to Scarborough a receipt for the same in the following terms :—

"Hull, 16th Feb. 1864.

"Memorandum that I have received of Messrs. Scarborough & Tadman, of Hull, a bill of lading and policy of insurance for about sixty tons of linseed-

cake, shipped ex 'Marie Joseph,' dated at Bordeaux, 11th February, 1864, and which I hold as security against their acceptance of Messrs. Maxwell & Dreossi's draft for 427*l.* 1*s.* 7*d.* due on the 14th of May, 1864, until the cakes are sold or the vessel arrives.

"WALTER STERICKER."

On the 18th of February, 1864, Mr. Walter Tadman, the other member of the firm of Scarborough & Tadman, called on Stericker, and stated to him that his firm had sold the linseed-cake to a Mr. Croysdale, who would accept a bill of exchange against the bill of lading, and Mr. Tadman asked for the bill of lading. Trusting to this representation, Stericker returned the bill of lading to Tadman. The representation was untrue, no such sale had taken place. On the same day, the 18th of February, but shortly afterwards, Messrs. Pease & Co., the plaintiffs, who are bankers in Hull, sent a message to the office of Scarborough & Tadman requesting one of the members of the firm to call upon them at the bank. No reason for the request seems to have been given with the message; but Messrs. Scarborough & Tadman could not have failed to know it was respecting the debt of their firm to the bank on their running account. Upon receipt of the message Mr. Tadman went to the bank, taking with him the bill of lading, and also some warrants for some rib-grass, and saw Mr. Arthur Pease, a member of the banking firm. Mr. Pease asked him to reduce the debt of the firm, but did not ask him for security. Tadman thereupon offered to him as a security the bill of lading, the policy of insurance, and the warrants; and this offer Mr. Pease accepted. Tadman then indorsed the bill of lading, and delivered it with the other documents to Mr. Pease; and a memorandum in the usual form was drawn up, to the effect that the documents were delivered as a security for advances then made, or which might afterwards be made, and giving authority to the bank to sell the goods, placing the proceeds to the credit of the depositors. By an oversight, however, this memorandum was not signed by Mr. Tadman. Mr. Pease, at the date of this transaction, did not know the history of the bill of lading, but assumed it to be, as it purported, the lawful property of Scarborough & Tadman: he had no suspicion that Scarborough & Tadman were insolvent, or on the eve of insolvency, though he knew through the banking account that they were mixed up with the dealings of Mr. Moor. Mr. Moor did not become bankrupt till the 4th of March, and on the 7th of March Scarborough & Tadman also stopped payment. On the 5th of March, Messrs. Maxwell & Dreossi telegraphed to Stericker to stop the delivery of the linseed-cakes, and announced that a bill of lading indorsed to Stericker would be sent by the same post. This was accordingly done, and on the 7th of March Stericker received a bill of lading, being a duplicate of the one indorsed to Scarborough & Tadman, except that it was indorsed to him, Stericker. The vessel

arrived in Hull on the 5th of April: a water-clerk came on board first, and warned the captain that two persons claimed the cargo. He was shortly afterwards followed by Johnson, the clerk of the solicitors to the plaintiffs Pease & Co., who presented the bill of lading held by the plaintiffs and claimed the cargo. When it was first presented, it was not indorsed by Messrs. Pease & Co., the plaintiffs, this was not done till the 7th. On the same day, the 6th, but later, Stericker came on board and presented his bill of lading, and eventually obtained possession of the cargo, the captain receiving an indemnity from Maxwell & Dreossi. On the 9th of April, Messrs. Pease & Co. commenced this action against "The Marie Joseph" and her master.

The Admiralty Advocate and Clarkson, for the plaintiffs.

Dr. Deane, Q.C., and Butt, for the defendants.

The principal arguments, and cases cited, were considered in the judgment.

DR. LUSHINGTON.—The second bill of lading indorsed to Stericker may be disregarded: it was made and indorsed long subsequent to the first bill of lading by Tadman to the plaintiffs. If Messrs. Maxwell & Dreossi had a right to stop *in transitu*, they did not, in order to exercise that right, need to give another bill of lading to their agent.

Then as to the indorsement of the bill of lading by Tadman to the bank, to secure the past and future advances to the firm. I am satisfied, firstly, that this was an indorsement for valuable consideration; secondly, that the bank had no reason to question it as fraudulent against any principal (for Tadman was owner and not factor, and therefore the case of *Patten v. Thompson* (5 M. & S. 351) does not apply); and, thirdly, that it was not fraudulent against the creditors of Scarborough & Tadman. For to use the words of the judgment in *Vancasteel and Others v. Booker* (2 Exch. 691), "to defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors, by proving it to be voluntary on the part of the bank-

rupt, and in contemplation of bankruptcy, and if it is made in consequence of the act of the creditor it is not voluntary." In this case I think the transfer was made in consequence of the act of the creditors, for it was only upon Messrs. Pease pressing for a reduction of the debt of Messrs. Scarborough & Tadman, that Tadman offered them the bill of lading as security.

If, therefore, Scarborough & Tadman had immediately upon receiving the bill of lading indorsed it to Pease & Co., I should have held, upon the authority of *Lickbarrow v. Mason* (1 Sm. L. C. 595), *Spalding v. Ruding* (6 Beav. 376), and *Re Westzinthus and Others* (5 B. & Ad. 817), that the vendors would have lost their right to stop *in transitu* as against the lien of the bank. But this was not the case. Instead of doing so, Scarborough & Tadman returned the bill of lading to Stericker, then Tadman repossessed himself of it by fraud, and then indorsed it to the bank. The bank could, under these circumstances, only be entitled to the bill of lading, if a bill of lading was as negotiable an instrument as a bill of exchange. But on this point Lord Campbell observes, in *Gurney v. Behrend* (3 El. & Bl. 633), "It is not enough for the plaintiffs to show they had become *bond fide* holders of the indorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bond fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bond fide* transferee for value cannot make title under it, as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." Applying this doctrine to the present case, I must hold that the fraudulent conduct of Tadman invalidated the indorsement to Pease & Co.; and Pease & Co., though they became holders for valuable consideration, and though quite innocent of participation in the fraud, cannot dispute the vendor's right to stop *in transitu*.

EQUITY.

Lord Chancellor. } *Re JOWETT.*
23 Nov. 1864. } *Ex parte OSBORN.*

Bankruptcy Act, 1861, s. 109—Allowance.

An allowance made to a bankrupt by a majority in value of the creditors under the Bankruptcy Act, 1861, section 109, ceases on the day appointed for the sitting for the last examination, and does not continue during an adjournment of such sitting.

Edmund Jowett having been duly adjudicated a bankrupt, a meeting of his creditors was held on the 8th of February, 1864, according to the provisions of the 109th section of the Bankruptcy Act, 1861, and at such meeting a majority in value of the creditors present did, in exercise of the power vested in them by that section, determine that an allowance of 2*l.* a week should be made to the bankrupt for support from the date of the adjudication up to the time of passing the last examination.

The resolution pursued the language of the last sentence of the 109th section, which is as follows:—

“At this meeting a majority in value of the creditors present shall determine whether any and what allowance for support shall be made to the bankrupt up to the time of passing his last examination.”

The 22nd of March was duly appointed for the bankrupt to pass his last examination, and before that day the bankrupt filed a balance-sheet according to the 141st section of the Act. The last examination was, however, adjourned from the 22nd of March to the 10th of June, in order to enable the assignees to investigate the accounts, and on the latter day was again adjourned to the 10th of November, and the bankrupt was required to render further accounts.

In consequence of a resolution purporting to have been come to by the creditors present at a meeting of the 10th of June the assignees discontinued the allowance. The bankrupt thereupon obtained a rule from the Court of Bankruptcy at Leeds, calling upon his assignees to show cause why they should not continue the allowance. On the hearing of the rule, Mr. Commissioner West decided that the assignees had no power to discontinue the allowance, and ordered that it should be paid to the bankrupt up to the time of his passing his last examination.

Against this order the assignees now appealed.

Sargood for the appellants.

If the words in the Act, “up to the time of passing his last examination,” are to be held to mean, until the bankrupt shall actually pass his last examination, it will hold out a direct inducement to a bankrupt to

render insufficient accounts, and further, where the examination is adjourned *sine die*, the bankrupt will in effect be entitled to an annuity for his life.

De Gez for the bankrupt.

The Act confers no power on the creditors or on any other person to stop the allowance once granted, before the time specified in the statute has expired. At all events it cannot be discontinued, as in the present case, on the mere motion of the creditors or the assignees, and without giving the bankrupt an opportunity of showing cause against the disallowance.

THE LORD CHANCELLOR, without calling for a reply, said, that the allowance could not have an existence beyond the duration of the power given by the statute. The language creating it, if ambiguous, must not receive an interpretation which would lead to consequences so absurd, that it could not be supposed that the Legislature intended them. The construction which the bankrupt contended for would enable a dishonest or an obstinate person to obtain a benefit for his life, and would place a premium on fraud, and on attempts to evade the rendering of proper accounts. Nay more, it might interfere with the whole course of the distribution of the estate. It might be impossible to declare a final dividend, because money had to be reserved till the end of the bankrupt's life, and, if he persisted in refusing, or was never allowed, to pass his last examination, the whole estate might be required.

Since, then, this construction led to such consequences, it could not be the true one; especially when there was another obvious meaning. The time of the last examination was appointed by the statute, and therefore in this section these words must be read with reference to the antecedent and subsequent enactments, which defined that time. It was the same as if the words had been “up to the time for passing the last examination,” that is, the time appointed by the statute. The only objection to this construction was, that it limited the power of the creditors; that the examination might be postponed without any fault of the bankrupt, and that yet the creditors would have no power to continue the allowance. But the Legislature seemed to have thought that this power was a great indulgence to the bankrupt, and had confined its operation within specified limits of time. The other construction would render the clause subversive of other enactments, and as it was the duty of the Court to make the whole Act harmonise, it must be held that the “time of passing the last examination” was the time elsewhere spoken

of in the statute, and that in the present case the power was now exhausted. Undoubtedly, if all the creditors consented, a further allowance might be made, but the statutory allowance ceased when, according to the statute, the bankrupt ought to have passed his last examination. There would be a declaration accordingly, but under the circumstances he should not call upon the bankrupt to refund any money that had been actually paid.

Note.—See,

Re Leech, Ex parte Ellerton, 4 N. R. 76, as to the power of the Commissioner, under the 194th section of the Consolidation Act, 1849, to grant the bankrupt an allowance “until he shall have passed his last examination,” and *quære*.

The allowance made by the Commissioner in *Re Leech* (*loc. cit.*), was made at an adjourned sitting.

Lords Justices. } *Re GREGSON'S ESTATE.*
28 JULY, 4, 29 NOV. 1864. }

Will, Construction—Survivorship—Real Estate.

Where, in a will, real estate is given to A for life, with remainder to B, C, and D, “or the survivors of them” :—

Held, *that the words of survivorship are to be referred to the death of the tenant for life.*

This was an appeal from the decision of Vice-Chancellor Wood (reported 4 N. R. 222), upon the question whether the words, “or the survivors of them,” added to a devise (subsequent to a devise for life) of real estate to twelve persons named in a will, were to be referred to the period of distribution, that is, the death of the tenant for life, or to the death of the testator.

The appellants were three of the devisees, who survived the tenant for life.

Roll, Q.C., and *E. R. Turner*, contended that only those of the twelve devisees, who survived the testator's widow, the tenant for life, were intended by the testator to take under the devise; and that there was no settled rule of law which could prevent that intention from being carried out.

They cited,

Cripps v. Wolcott, 4 Mad. 11 (which settled the rule as to personal estate, and had been followed by numerous subsequent cases);
Buckle v. Fawcett, 4 Harv. 536;
Wordsworth v. Wood, 1 H. of L. Ca. 129;
Doe v. Prigg, 8 B. & C. 831;
Taylor v. Beverley, 1 Coll. 108;
Boraston's Case, 3 Co. 21 a, b;
1 Jarman, Wills, 791;
Phillips v. Deakin, 1 M. & S. 744;
Wilson v. Bayly, 3 Bro. P. C. 195;

Goodtitle v. Whitby, 1 Burr. 228;
Doe v. Moore, 14 East, 604;
Rose v. Hill, 3 Burr. 1881;
Stones v. Heurtley, 1 Ves. 165;
Perry v. Woods, 3 Ves. 204;
Garland v. Thomas, 1 Bos. & P. N. R. 82;
Edwards v. Symon, 6 Taun. 213;
Littlejohn v. Household, 21 Beav. 29;
The Commissioners of Charitable Donations v. Cotter, 1 Dr. & W. 498;
Young v. Robertson, 4 Macq. 314;
2 Jarman, Wills, 689;
Hawkins, Const. Wills, 262.

E. E. Kay (Sir Hugh Cairns with him), for the representatives of those devisees who survived the testator, and died in the lifetime of the tenant for life, contended that the authorities decided that the rule, as to real estate, was different to that as to personal estate. The cases of

Rose v. Hill (*loc. cit.*)
Stringer v. Phillips, 1 Eq. Ca. Abr. 292;
Edwards v. Symons (*loc. cit.*);
Doe v. Prigg (*loc. cit.*);
were decisive upon this point.
Buckle v. Fawcett (*loc. cit.*)

was a case of mixed realty and personalty.

E. R. Turner, in reply.

KNIGHT BRUCE, L.J., after stating the terms of the will, and the facts of the case, said, that the dispute turned upon the meaning of the word “survivors,” as used in the will. He thought it plain, that if the instrument was read and construed according to the ordinary rules of the English language, as spoken and written by ordinary persons on ordinary occasions, the word “survivors” must be understood in the manner desired by the appellants, that was, as excluding the representatives of the six persons who died in the lifetime of the tenant for life. But it was said that the rules of English law, concerning real estate, and especially concerning contingent remainders in real estate, as those rules existed before, and when the will was made, rendered it incumbent upon the Court to lean in favour of ascribing to the testator an intention to give to the twelve devisees, respectively surviving him, interests at his death, but not, as to any of them, contingent interests. In support of this proposition the case of *Doe v. Prigg* (*loc. cit.*), and many other authorities, had been cited. But it was not, and could not, be denied that the intention ascribed to the testator by the appellants was one which he had a right by law to entertain, nor could it be denied that he could have inserted a clause in the will sufficiently explicit to have entitled the appellants to what they now sought. His Lordship's opinion was, that the will in its actual state exhibited the testator's intention to use the word “survivors” in the sense contended for by the appellants, as clearly as if he had used any more

explicit clause. The testator had a right to say, and did say, that those of the twelve devisees who should die in the lifetime of his wife should be excluded in favour of those of the twelve who should survive both her and the testator himself. His Lordship considered that in so holding he was not contradicting *Wilson v. Bayly* (*loc. cit.*), or any other authority binding upon the Court.

TURNER, L.J., said, that the question, which arose between those of the devisees who survived the tenant for life, and the representatives of those who died between the period of the testator's death, and that of the tenant for life, could not fairly be stated otherwise than as one of doubt and difficulty, having regard to the state of the authorities upon it: but that, as certainly, it might be stated, that it was in all cases, fairly and simply, a question of intention. The sole question was, did the testator intend to give the property in question to such of the twelve persons named in the will as should survive himself, or to such of them as should survive both himself and the tenant for life named in his will. This question must mainly depend upon the terms of the particular devise. He would first consider this without reference to the authorities. The undisputed rule was to construe the words according to their common and ordinary meaning, and in the sense in which they would be understood by persons of common understanding. The word "survivors" was a word of relation; it must refer to some particular period of time; in this will it was placed in immediate connection with the death of the testator's widow, and no other period was anywhere referred to. Nowhere in the will was the testator's death mentioned; it was natural, therefore, to refer the word "survivors" to the death of the tenant for life. Besides, every testator must, *prima facie*, be taken to assume that his devisees would survive him; where, therefore, a testator used words of survivorship, they ought not to be construed as referring to the event of the devisee dying in the testator's lifetime, if there were any other period to which they could refer. If, indeed, the devise were immediate, then they must do so, no doubt, because they could, in that case, refer to no other period; but there was no such necessity, where there was an estate given prior to the devise, in which the words of survivorship were contained, as there the testator was, *prima facie*, to be assumed as having the death of the tenant for life in contemplation. It seemed, therefore, that, without reference to the authorities, by the true construction of the present will, those of the devisees only, who survived the tenant for life, were entitled to the property. The decision under appeal, if to be supported at all, must be supported, not upon principle, but upon the authorities. And, indeed, it was upon these that his Honour the Vice-Chancellor rested his decision.

It remained to consider the question from that point of view. Now, in the disposition of personal estate, it was established by *Cripps v. Wolcott* (*loc. cit.*), and a long train of decisions following that case, that words of survivorship were to be referred to the period of distribution; but, though this was not denied at the Bar, it was said that, as to real estate, the law was otherwise, and that the period of the testator's death was, that to which such words were to be referred. Several cases were cited in support of this position; those on which reliance was placed were *Stringer v. Phillips* (*loc. cit.*), *Rose v. Hill* (*loc. cit.*), *Wilson v. Bayly* (*loc. cit.*), *Garland v. Thomas* (*loc. cit.*), *Edwards v. Symons* (*loc. cit.*), and *Doe v. Prigg* (*loc. cit.*), and these were a fair sample of many cases in which the same conclusion had been drawn by the Courts of Law; for it could not be denied that the Courts of Law had, as to real estate, leaned strongly in favour of the vesting at the testator's death, whilst the Courts of Equity had leaned as strongly, as to personal estate, to the vesting at the period of distribution. The cases were, indeed, irreconcilable, and, in saying this, he only repeated what had been said by other Judges. The question was, however, as he had before said, one of intention, and, in the great majority of the cases, there was some context in the wills which affected the decision. This was the case in *Rose v. Hill* (*loc. cit.*), and in *Wilson v. Bayly* (*loc. cit.*), but not so in *Stringer v. Phillips* (*loc. cit.*), nor in *Doe v. Prigg* (*loc. cit.*), and upon these, especially the latter, the respondents had mainly relied. But, adverse to these decisions, there was the case of *Buckle v. Favocett* (*loc. cit.*), which involved both real and personal estate, and *Taylor v. Beverley* (*loc. cit.*), which, however, was a case of personal estate only. Again, the House of Lords, in *Wordsworth v. Wood* (*loc. cit.*), pointedly disapproved of *Doe v. Prigg* (*loc. cit.*), though it did not appear whether this disapproval did not apply only to the survivorship being referred to the death of the testator in the case of a devise to a class. Much reliance ought not, therefore, to be placed upon this disapproval; but, in *Young v. Robertson* (*loc. cit.*), the House of Lords seemed very decidedly to have held that the general rule was, to refer the survivorship to the period of distribution.

It was necessary, in this almost painful conflict of authorities, to consider the reasons of the conflicting decisions.

The foundation of the decisions as to personal estate was plain. They were founded, and well founded, upon the intention of the testator. It was said, for the respondents, that the difference between the conflicting decisions, arose from the different sources from which the law as to personal and real estate was derived; but the governing question under both laws, was, as to the intention of the testator. The law was subordinate to the intention, and came into force only when that had been

ascertained, and could not be the medium by which that was to be ascertained; and, therefore, there could be no settled law by which the intention was to be determined. His Lordship quite agreed with the observations, upon this point, of Sir James Wigram, in *Buckle v. Farwell* (*loc. cit.*).

The cases as to real estate, in which the survivorship was referred to the death of the testator, seemed to have proceeded upon one of two grounds: One, that, the contingent remainder being liable to be destroyed, the law favoured the early vesting of estates, to avoid this and other inconveniences of tenure; but it was not satisfactory to put a forced and strained construction upon the words of a testator, in order to meet the inconveniences of tenure. The other ground was, that the danger of lapse was so avoided or diminished; but this argument would be applicable equally to personal estate. His Lordship thought, then, that the words of the will ought to be construed according to their natural meaning, unless qualified by the context; and that, however this case might have been decided long ago, it ought now to be decided in favour of the appellants; and that the fund in question ought to be divided between such of the devisees only as survived the tenant for life.

His Lordship added, that in the present case there were other parts of the will, *e. g.*, a power of sale given to the widow, to which he did not wish to refer, as he preferred to decide this case upon broad and general grounds, although it might be that those parts of the will would favour the appellants' contention.

**Kindersley, V.-C. } LORD RANELAGH v.
14, 16, 26, Nov. 1864. } MELTON.**

***Vendor and Purchaser—Specific Performance—
Time Essence of Contract.***

Where an option was given to lessees to purchase the freehold, upon giving three months' notice within seven years, and paying, at the expiration of such notice, a given sum, and all rent payable, including the current quarter:—

Held, that time was of the essence of the contract.

The plaintiffs in this suit were the trustees of the Conservative Benefit Building Society; they entered into an arrangement to advance money to Messrs. Banks & Vinall, builders, who were to take land on building leases from the defendant.

In pursuance of that arrangement, a deed was executed, dated the 22nd of December, 1857, between the defendant, therein called the lessor, and the trustees of the society, and Messrs. Banks & Vinall, therein called the lessees. The deed contained a clause, in the following terms:

"In case at any time, within the space of seven years, from the 23rd day of June, 1856, the lessees

shall be desirous of purchasing the fee-simple and inheritance of all or any of the said plots of ground, and of such their desire shall give three months' notice to the lessor, and shall, at the expiration of such notice, pay unto him the sum of 210*l.*, in respect of each plot mentioned in such notice, and all rent payable to, and including the current quarter, then the lessor shall and will convey the freehold and inheritance of the plot or plots mentioned in such notice, unto and to the use of the lessees, or as they shall direct."

There was also contained in the deed a proviso, that the heirs, executors, administrators, or assigns of the respective parties to the deed should have the benefit of its provisions as if they had been original parties to the deed; and a further proviso, that the lessees, being satisfied with the title, should not make any requisitions.

Messrs. Banks & Vinall subsequently assigned their interest under the deed to the plaintiffs.

On the 20th of March, 1863, the plaintiffs sent notices to the defendant to purchase each of the plots comprised in the deed of the 22nd of December, 1857; but when the notices expired on the 20th of June, 1863, the purchase-money had not been tendered as required under the proviso.

On the 1st of July, 1863, draft conveyances were sent by the plaintiffs to the defendant, who then refused to complete, on the ground that the condition of the deed had not been complied with.

The plaintiffs accordingly instituted the present suit, for specific performance of the sales of the several plots of land comprised in the deed of the 22nd of December, 1857.

Glasse, Q.C., and Purcell, for the plaintiffs, contended, that Equity held, that time was not of the essence of the contract in cases of this nature. In Equity, conversion took place on the notice being given,

Lawes v. Bennett, 1 Cox, 167, cited in *Ripley v. Waterworth*, 7 Ves. 446; *Townley v. Bedwell*, 14 Ves. 596; and *Daniels v. Davison*, 16 Ves. 254;

Weeding v. Weeding, 1 J. & H. 424.

The present case was governed by

Pegg v. Wisden, 16 Beav. 239.

Brooks v. Garrod, 3 K. & J. 608; 2 De G. & J. 62,

had no bearing, and differed from the present case, inasmuch as there the condition was under a will, while here the contract was *inter vivos*.

"At the expiration of such notice," meant "after," &c.

Baily, Q.C., and Graham Hastings, for the defendant, argued that the cases cited respecting conversion were not in point, as between a vendor and a purchaser, on a question concerning the validity of their contract. In *Pegg v. Wisden* (*loc. cit.*), there was mutuality:

specific performance could have been enforced by either side.

They also cited,

Barrel v. Sabine, 1 Vern. 268 ;

Endsworth v. Griffiths, 3 Bro. P. C. 184 ;

Davis v. Thomas, 2 Russ. & My. 506 ;

Joy v. Birch, 4 Cl. & Fin. 57.

"At the expiration" could not mean "after," for the vendor would be kept in suspense. The terms of the contract must be construed strictly against the party having the privilege, or there would be no mutuality. There was no distinction between a conditional privilege given under a will, and one given by a contract *inter vivos*,

Honnyman v. Marryat, 21 Beav. 14.

Glasse, Q.C., in reply.

25 Nov. 1854.

KINDERSLEY, V.-C., said : If two persons entered into a contract, as vendor and purchaser, that the purchase-money should be paid, on a certain day, it was well settled in Equity, that time was not of the essence of the contract : it was, on the other hand, equally well settled, that, where there was a condition, that, if one party should do a certain thing on a certain day, he should be entitled to a particular privilege, the condition must be strictly performed,—in order to entitle him to the benefit of that privilege. The question here, therefore, rested solely on the construction, to be placed by the Court upon the words, "at the expiration of such notice." The language was clear, and the Court would not interfere to assist the plaintiff to obtain the benefit of a privilege, of which he had neglected to fulfil the condition. The bill must be dismissed with costs.

Stuart, V.-C. } PHILLIPS v. PHILLIPS.
23 Nov. 1864. }

Will, Construction—Substituted Gift to Children.

Legacies were devised to the testator's cousins, with a proviso, that the issue of any who "shall die" in the testator's lifetime, should take their parents' shares:—

Held, on the whole will, that the issue of cousins, who were dead at the date of the will, took under the proviso.

Christopherson v. Naylor (1 Mer. 320), commented upon.

The will in this case contained the following bequest:—

"To each and every other of my cousins, sons and daughters of the several brothers and sisters of my late mother, who are not personally named or otherwise mentioned in this my will, or in any codicil thereto, I give the sum of 100*l.* each ; and if it shall happen that any of those my said cousins shall die

during my lifetime, and leave issue which shall survive me, then I direct that the several legacies, which would have been payable to any deceased parent, shall be paid to his or her children."

A bequest, in similar terms, followed to the testator's cousins on the father's side, and then a proviso avoiding the legacies, in case "it shall happen that my executors shall fail to discover and find out . . . any one or more of my said cousins, whether of my father's family, or of my mother's, who may be living at the time of my decease, or any one or more of the children of such of my cousins as may have died during my lifetime."

Several cousins of the testator had died during his lifetime, but before the date of his will, leaving issue who survived him, and a question arose, whether the issue took under the bequests above quoted.

Malins, Q.C., and *Hardy*, for the residuary legatee.

The original gift is, by construction, only to the cousins living at the date of the will ; the further gift is by substitution, and substitution cannot extend the class,

Parsons v. Gulliford, 10 Jur. (N. S.) 231 ;

Christopherson v. Naylor, 1 Mer. 320 ;

Coulthurst v. Carter, 15 Beav. 421 ;

Re Sheppard, 1 K. & J. 269 ;

Butler v. Ommancey, 4 Russ. 70 ;

Waugh v. Waugh, 2 Myl. & K. 41 ;

Loring v. Thomas, 1 Drew. & Sm. 497, 519 ;

Smith v. Pepper, 27 Beav. 86 ;

Crook v. Whitley, 7 De G. M. & G. 490.

Greene, Q.C., and *C. C. Barber*, for the children of cousins who died before the date of the will.

Bevir, for the executors.

STUART, V.-C., said : Sir William Grant decided in *Christopherson v. Naylor* (*loc. cit.*), that a substituted gift to children could only be valid where the parent had a chance of taking. The judgment in that case was most accurately reasoned, but his Honour could not accede to the notion, that you cannot have a gift, expressed to be by way of substitution, to the children of a person who could not have taken under the original gift. If, in *Christopherson v. Naylor*, the words had been, "are dead, or shall die," there would have been no difficulty. In the present case, the language of the proviso excluded the application of *Christopherson v. Naylor* (*loc. cit.*), and to do justice to the testator, and to give effect to every part of his will, it was necessary to hold, that the children of cousins, dead at the time of the will, took.

Stuart, V.-C. } LAUTOUR v. THE ATTORNEY-
22 Nov. 1864. } GENERAL

Contract with the Crown—Practice—Specific Performance—Laches.

The plaintiff, on the faith of the regulations of the

Colonial Office, spent money in a colony, so as to entitle himself to large grants of land:—

Held, on demurrer to a bill filed by leave of the Lord Chancellor, upon a petition of right against the Attorney-General, that the Crown had entered into a contract with the plaintiff to grant the land, and that the Court was empowered to make a declaration of the plaintiff's right to specific performance, though it could not proceed to a mandatory decree.

This was a demurrer to a bill for specific performance against the Attorney-General.

In 1828, the British Government, being desirous of forming the colony of Western Australia, issued regulations offering grants of land to settlers in fixed proportions to the money expended by them in the colony, or in sending out labourers.

The plaintiff, General Lantour, asserted that he had spent about 40,000*l.* under the regulations, and that his accounts of that expenditure had been duly passed by the proper officer in the colony in 1830. He had obtained about that time a grant of 113,000 acres.

In 1838 the plaintiff opened a correspondence on the subject of a further grant with the Colonial Office, and was required to prove his expenditure again.

Anticipating no such second audit, he had, as he alleged, neglected to keep his papers and vouchers, and so was unable to prove for the whole 40,000*l.*; but Earl Russell ultimately reported in 1840 to the Colonial Office, that the plaintiff had expended 29,000*l.* under the regulations. The plaintiff alleged that pecuniary embarrassment had prevented him for many years from prosecuting his claim, on the footing of that report, to a further allotment of 342,000 acres; but ultimately, in 1857, he presented a petition of right, and moved the Lord Chancellor for leave to file the present bill for specific performance against the Attorney-General, which leave was granted.

The Attorney-General, Q.C., and Wickens, for the Attorney-General, in support of the demurrer.

1st. The regulations were never intended to form the foundation of a contract at all. They expressed the intentions of the Crown, and were no doubt *bond fide* carried out by the Crown, but they were issued by Her Majesty in the exercise of her governing functions, and do not raise any right in a subject which comes within the jurisdiction of a municipal court.

2nd. Assuming that a contract could be founded upon the regulations, and apart from everything that is special in a petition of right, the plaintiff asks for specific performance twenty-seven years after the contract, and without alleging that he has performed all its conditions on his own part. He will allege waiver, but—

3rd. The matters unperformed are of the very essence of the contract. And besides, if there be any contract here at all, it is one arising out of representations held out by one party, and acted upon by the other, in which case there is no contract constituted upon

which waiver could operate, until all the conditions contained in the representations have been complied with. The promise of grants of land is made to persons who are defined by their being persons who have done certain acts, and the plaintiff having only done some of the acts, is not one of those persons. There is no allegation of any such formal acceptance as would convert the unilateral offer into a contract. The allegation of waiver is only general, and not of a distinct waiver, after which the plaintiff proceeded to act upon the faith of the varied offer.

4th. Relief of this kind cannot be decreed against the Crown. Specific performance requires a person on whose conscience the Court can act.

There is no authority for any relief on a petition of right in a case similar to the present. The cases under the Petition of Right Act (23 & 24 Vict. c. 34) all relate to money due from the Crown to a subject, *Staunford on Prerogative*, tit. "Petition," cap. 22; *Tobin v. The Queen*, 4 N. R. 274; 16 C. B. (N. S.) 310;

Viscount Canterbury v. The Attorney-General, 1 Ph. 306;

Brooke's Settlement (unreported).*

This bill asks the Court to compel the Crown to do something—to allot and grant—and the Court has neither jurisdiction to make, nor power to carry out, any such decree. Is the grant to be settled in Chambers? The Queen does not by her indorsement, "Let right be done," abandon her prerogative.

We admit, however, that the plaintiff is entitled upon this bill to any relief to which he might be entitled upon a petition of right prosecuted in the usual manner.

Sir H. Cairns, Q.C., and Jessel, for the plaintiff.

1st. We ask for no mandatory order, and our prayer is not to be refused on the ground of its excess on the pleadings. We ask for a declaration of the plaintiff's right, upon which the Crown will, no doubt, in its discretion, act,

Serjt. Manning's Exch. Practice, 84;

Taylor v. Attorney-General, 8 Sim. 413, 424.

2nd. The fact that a contract between the Crown and a subject affects a matter of State, does not make it the less a contract. A contract to build a ship of war is a matter of State. But the only matters which are not matters for suit in a municipal Court are matters of paramount sovereign right, where the Sovereign professes to act by virtue of absolute power, and not when he descends to the level of a subject and enters into a contract,

The Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P. C. C. 22;

The Duke of Brunswick v. The King of Hanover, 6 Beav. 1; 2 H. of L. Ca. 1.

* It was a case under 23 & 24 Vict. c. 34, in which next of kin made a claim, after the fund had been transferred to the account of the Secretary of the Treasury and Paymaster-General.

3rd. Down to 1840 the plaintiff's accounts were not finally settled, and his claim, consequently, not ascertainable. But when a contract has been performed by one party, the defence of delay is not open to the other party,

Bellamy v. Sabine, 2 Ph. 425, 449.

The unequal position of the parties, and the difficulty of obtaining a final admission or denial of his claim, furnishes the plaintiff with sufficient excuse for his delay. Even if any of the conditions have been left unperformed, they have been waived by the authorised agents of the Crown.

4th. The counsel for the Crown do not pretend that there is any authority for saying that the relief on a petition of right does not extend to cases of this nature. On principle it ought to be granted. The line is drawn strongly between cases of contract and of tort, in the authorities they have quoted. If the right to the payment of money may be declared, why not of a certain number of acres, at the selection of the Crown, out of the waste lands now in its hands. It is like the cases of contracts to sell shares, which are specifically performed. In

Clayton v. The Attorney-General, 1 Coop. C. C. 140, specific relief was sought, and though that suit failed on the facts, its frame was not impeached.

They further cited, in support of the present mode of procedure,

Clayton v. Attorney-General, 1 C. C. C. 94 ;

Taylor v. Attorney-General, 8 Sim. 413 :

and as to the regular proceedings on a petition of right, *Baron de Bode's Case*, 8 Q. B. (N. S.) 208.

The Attorney-General, in reply.

STUART, V.-C., said : The case had been argued as one founded on contract. It seemed to him rather to be a case of a person acting upon the faith of representations held out by another. The general equity was that stated by Lord Cottenham in *Hammerley v. Baron de Biel* (12 Cl. & Fin. 62), "A representation made by one party for the purpose of influencing the conduct of the other party, and acted upon by him, will, in general, be sufficient to entitle him to the assistance of this Court, for the purpose of realising such representation." It was true that, in the present instance, he could make no mandatory decree. The main question now, however, was, whether or not there was, in the allegations of the bill, sufficient to show such a compliance with the regulations which constitute the representation, as to entitle the plaintiff to such relief as the Court could afford. He considered that the allegations in the bill were sufficient.

On the question of delay, the case of the Crown had failed. The situation of the parties was not altered, and the plaintiff had accounted for the interval.

The demurrer must be overruled.

Note.—See

Robertson v. Dumaresq, 3 N. R. 587,

a case very similar in its facts to the present. It was

an appeal, tried before the Privy Council, respecting a proceeding in the nature of an action brought by the respondent, in substitution for the remedy by petition of right (under a local statute, 20 Vict. No. 15) against the Government of the Colony of New South Wales.

Wood, V.-C. } TYNTE v. HODGE.
15, 16, 18, 19, 22 Nov. } TYNTE v. BEAVAN.

Heir—Reversion—Annuity—Bill of Review.

An expectant heir, after mortgaging his estates to a large extent, raised money by way of annuity charged on reversionary estates. Evidence of auctioneers and actuaries who stated that a fair value had been given, in the absence of any evidence to the contrary beyond calculations from data and tables,

Held, sufficient to support the annuities.

An annuitant having filed a bill to enforce his security a decree was made on that and several other incumbrancers' suits, directing accounts and inquiries as to incumbrances, giving a receiver liberty to keep down the interest on incumbrances and the annuity in question, and any other annuities which should be certified, and declaring that the plaintiffs and the defendants who should be ascertained to be incumbrancers should be at liberty to add their costs to their incumbrances. The owner of the estate afterwards filed a bill to set aside the annuity :

Held, that the decree was a bar to this bill.

These suits, two out of the many concerning the Tynte estates, had a similar object, viz., to set aside two annuities, both granted by Colonel Tynte the younger, the one to the General Reversionary and Investment Company, of which Mr. Hodge was secretary, and the other to Mr. Beavan.

At the date of the transactions in question the Tynte estates comprised—

1st. The Swinnerton estate, of the annual value of 1,374*l.*, of which Colonel Tynte was tenant for life in possession, but which was incumbered beyond the rental.

2nd. The Maindee estate, of which the rental was about 4000*l.*, and to which Colonel Tynte was absolutely entitled, but which was also heavily incumbered.

3rd. The Cefn Mabley estate, which produced about 7000*l.* a-year, subsequently increased by royalties and mining leases to 11,000*l.* a-year. It was settled, subject to prior charges amounting to 90,000*l.* after the death of Colonel Tynte's father, on Colonel Tynte for his life, with a joint power of appointment in Colonel Tynte and his father over parts of the estate.

4th. The Halswell estates, exclusive of mansion-house and deer-park, of an annual value of between 4,500*l.* and 5000*l.*, settled subject to prior charges, on Colonel Tynte's father for life, with remainder, after making certain provisions for Colonel Tynte's wife, and younger children in case of Colonel Tynte's death in his father's life, to Colonel Tynte for life.

5th. The Tate estates and trust funds, the first of the yearly value of 1,600*l.*, the other representing about 48,690*l.*, settled on Colonel Tynte for life, in reversion after the death without issue of Mary Tate, a spinster, sixty-eight years of age, and the deaths of Miss Pinfold, also advanced in age, and Colonel Tynte's father.

The interest of Colonel Tynte in all these estates was heavily incumbered, and he was in very embarrassed circumstances.

The plaintiff was born on the 17th of March, 1800, and his father on the 29th of May, 1778.

In 1847 an arrangement was effected, whereby Mr. Baker, who had a mortgage on the estates for 5000*l.*, and the General Reversionary Company, who had purchased an annuity from Colonel Tynte, and had also a mortgage on his estates, having agreed to have their securities on the Maindee estate postponed to a mortgage to the West of England Fire and Life Insurance Company, the Insurance Company advanced 85,000*l.* to pay off incumbrances. At the same time that this arrangement was carried out, the amount of money so raised falling short of Colonel Tynte's requirements, 28,000*l.* was raised by the grant of an annuity for ninety-nine years, if Colonel Tynte should so long live, to the Reversionary Company, and the former annuity and mortgage debt to the company were paid off out of the purchase-money. This transaction was effected by several deeds; by one, dated the 9th of March, 1847, Colonel Tynte, in consideration of 28,000*l.*, granted an annuity of 3,545*l.*, charged on the Maindee estates, to the Reversionary Company. The deed contained covenants to pay interest at 5*l.* per cent. on all arrears; to do all in Colonel Tynte's power to enable the company to effect insurances—to pay any extra premiums, and a power, after one year, to repurchase the annuity, on payment of all sums due and 28,886*l.* 5*s.* By a deed of even date, Colonel Tynte assigned his life interest in the Swinerton estates, and his reversionary life interest in the Cefn Mabley, Halswell, and Tate estates, and the Tate trust moneys to the Reversionary Company as a security for the annuity of 3,545*l.* Mr. Baker, the family solicitor, was employed by Colonel Tynte throughout these transactions; and this transaction Colonel Tynte, in the suit *Tynte v. Hodge*, now tried to set aside.

On the 9th of March, 1847, the same day as the grant of the annuity to the Reversionary Company, Colonel Tynte, by another deed, conveyed the Maindee estates to Messrs. Crosse and Baker upon trust, for sale, and, after payment of the costs of sale, to pay the mortgage debts of 85,000*l.* to the West of England Fire and Life Insurance Company, and of 5000*l.* to Mr. Baker, and out of the surplus to redeem the annuity granted to the Reversionary Company. By the same, or a subsequent deed, of even date, Colonel Tynte mortgaged his interest in all his estates, other than the Maindee estate, to Mr. Baker, to secure an advance from Mr. Baker to him of 4,800*l.*, and

further advances up to 6000*l.* These deeds were unknown to the Reversionary Society and to Mr. Beavan.

On the 10th of March, 1847, the day following the last-mentioned transaction, Colonel Tynte, in consideration of 4,500*l.*, granted Mr. Beavan, a solicitor, an annuity of 675*l.* for ninety-nine years, if Colonel Tynte, the Queen, the Prince of Wales, and Mr. Beavan, or any of them, should so long live, charged on all the estates in which he had any interest, as well those (if any) not affected by the annuity to the Reversionary Company, as the estates comprised in such security. Interest, at 5*l.* per cent., was to be paid on all arrears of the annuity, which was redeemable on payment of 4,668*l.* 15*s.* In this transaction Colonel Tynte had no professional adviser, other than Mr. Beavan himself. And the object of the suit of *Tynte v. Beavan*, was to set aside this annuity.

The first intimation to the Reversionary Company of the existence of the trust deed of sale, was a letter from the trustees, giving the company notice of their intention to redeem, and asking the company to join in the conveyances. The Maindee estate was, after some difficulty and litigation, sold, and the surplus of the purchase-money, after paying off prior incumbrances, was paid to the Reversionary Company, in satisfaction of arrears on the annuity, and a sum of 7,442*l.*, part of such surplus, was invested by the company in the purchase of a Government annuity of 623*l.*, on the life of Colonel Tynte.

Colonel Tynte's father died on the 22nd of November, 1800. Miss Pinfold died in July, 1861, having outlived Mrs. Tate, who died without issue. Much litigation, and several suits by the various incumbrancers on the Tynte estates, among others *Hodge v. Tynte*, arose in different branches of the Courts of Chancery. These, if not already attached to Vice-Chancellor Wood's Court, were, by an order of the Lords Justices, transferred into that Court.

On the 7th of February, 1861, it was, by consent, arranged that a decree should be taken in all the suits; and the plaintiffs and defendants in *Hodge v. Tynte*, in order to obtain a decree by consent, consented to waive their respective rights to have answers filed.

On the 13th of February, 1861, the solicitors of Mr. Hodge gave notice of motion, for a decree in the suit of *Hodge v. Tynte*. The affidavits of the plaintiffs proved the title of the Reversionary Company to the annuity, and Colonel Tynte filed no affidavit in opposition, and raised no question as to the validity of the Reversionary Company's annuity.

Previously to this, a decree, dated the 12th of January, 1861, had been made in the suit of *Ford v. Tynte*, a suit instituted by an incumbrancer subsequent to the Reversionary Company, and to which that company was not a party, continuing a receiver previously appointed, and directing inquiries as to any incum-

branches affecting the lands and hereditaments mentioned in the then plaintiff's bill, and as to their priorities, and an account of what was due to the several incumbrancers, in respect of their several incumbrances; and an interlocutory order, dated the 18th of December, 1860, had been made in a suit of *Adams v. Tynte*, a suit instituted by mortgagees prior to the Reversionary Company, and to which that company and their trustees were made parties, which also directed inquiries as to what incumbrances affected the Cefn Mabley, Halswell, and Swinnerton estates, or the Tate estate and trust-moneys, or the interest of Colonel Tynte therein respectively, and what were their priorities.

By a decree, dated the 16th of February, 1861, made in all the suits upon certain applications, and upon motion for decree in the second suit of *Ford v. Tynte*, and in the suits of *Ford v. Adams*, *Adams v. Tynte*, and *Hodge v. Tynte*, it was ordered that the several inquiries, and the account directed by the decree in the first cause of *Ford v. Tynte*, dated the 12th of January, 1861, and by the order in the cause of *Adams v. Tynte*, dated the 18th of December, 1860, should be made and taken in the second cause of *Ford v. Tynte*, and in the causes of *Ford v. Adams*, *Adams v. Tynte*, and *Hodge v. Tynte*, as well as in the first cause of *Ford v. Tynte*, and in the cause of *Adams v. Tynte*. And it was also ordered, among other things, that receivers of the rents of the several estates should be appointed, and that they should be at liberty, from time to time, as the Judge should direct, to pay succession duty and premiums on policies of insurance properly payable, and keep down the interest of the incumbrances upon the estates, and an annuity of 300*l.* a year payable to Colonel Tynte's son, and the annuity and arrears of annuity in favour of the General Reversionary and Investment Company; and also any other annuities and rent-charges which should be certified to be charged on the estates, according to the priority of such incumbrances, annuities, and rent-charges respectively, out of the rents and profits of the estates charged therewith respectively. And the Court declared that the plaintiffs in these suits, and the several defendants thereto, who should be ascertained to be incumbrancers on the lands and hereditaments in the pleadings mentioned, were entitled to add the amount of the costs of those suits, up to the present time, to their respective incumbrances; such costs to be taxed by the Taxing-Master, as the Judge should direct.

In the further prosecution of those decrees, the Chief Clerk found that 14,399*l.* 8*s.* 8*d.* was due to the Reversionary Company, in respect of arrears and interest, to the 13th of November, 1861.

Some of the subsequent proceedings are reported in 1 N. R. 48, and 2 J. & H. 692, on an application by the defendants in the present suit to make Colonel Tynte give security for costs.

The grounds, on which Colonel Tynte now sought to set aside the annuities granted by him to the General

Reversionary Company and Mr. Beavan respectively, were of advantage taken of embarrassed circumstances to buy an annuity, greatly below its market value, and at exorbitant interest, as compared with the value of the security, at nearly 13*l.* per cent. in the case of the Reversionary Society, and 15*l.* per cent. in the case of Mr. Beavan.

The bills in both cases prayed the Court to set aside the respective annuities, Colonel Tynte offering to pay any balance which might be found due upon an account, to be taken on the footing of Colonel Tynte's repaying to the company the moneys advanced by them with interest, at such rate as the Court should direct.

The evidence for the plaintiff consisted in the valuation of actuaries, who, upon the data supplied them of the value of the estates, and the incumbrances affecting them, had calculated the value of the reversion, and then the value of an annuity of 3,545*l.*, secured on such reversion, with the following results—

| | |
|---|---------|
| Dr. Farr placed the value of the annuity at | £43,598 |
| Mr. Finlaison | 47,754 |
| Mr. Ansell | 34,449 |
| Mr. Brown | 40,264 |
| Mr. Downes | 33,566 |
| Mr. Morgan | 38,807 |
| Mr. Robins | 36,336 |
| Mr. Shuttleworth | 44,679 |

The evidence of the actuaries in *Tynte v. Beavan* was exactly similar, making allowance for the extra incumbrance, and the smaller annuity.

The evidence for the defendants consisted partly of the affidavits of two eminent auctioneers, one of whom, Mr. Clarke, said that the market was extremely limited for this class of security, especially where the amount was large, and was still more limited in 1847; that, in his judgment, it was very doubtful whether the annuity could have been sold at all by public auction in 1847, immediately after the railway panic, when the price of funds was low, and a great pressure existed in the money market; and that he was clearly of opinion, that it would not then have fetched more than 25,000*l.*; while the other, Mr. Marsh, placed the highest value of the annuity in March, 1847, if put up to auction, at 24,000*l.*, if purchased by private contract, at 27,200*l.*

Several eminent actuaries also gave as their opinion, that, considering the time and circumstances under which the annuity was sold, the fair market value of the annuity had been given, and that they would not have advised any person at that time to have given a greater price for it.

The same counsel were engaged in both cases, and the arguments as to the validity of the transaction, were similar in both the cases.

Rolt, Q. C., and *Renshaw*, for the plaintiff.

The evidence for Colonel Tynte is confined to two points, the value of the reversion, and the value of the annuity—taking the lowest calculation, a miserably

inadequate price had been given. There would be no argument on the point, that part of the lands were in possession,—as it was conceded that they were heavily incumbered. These were annuities granted out of a reversion, and were well-secured annuities.

There were two principles on which the Court set aside transactions of this nature—the protection of improvident heirs, and the policy of preserving family estates. The age of the expectant heir made no difference. An adequate price must be proved to have been given for the annuity. The market value must be given, and to show that it has been given, there must be proof that there was a market. Mr. Beavan, in his transactions with Colonel Tynte, had been Colonel Tynte's as well as his own solicitor, and had before been Colonel Tynte's family solicitor. They cited,

Wiseman v. Beake, 2 Vern. 121 ;
Davis v. Duke of Marlborough, 2 Swan. 140 ;
Earl of Portmore v. Taylor, 4 Sim. 182 ;
Shelley v. Nash, 3 Madd. 232 ;
Fox v. Wright, 6 Madd. 111 ;
Perfect v. Lane, on appeal, 8 Jur. (N. S.) 547 ;
Bromley v. Smith, 26 Beav. 644 ;
Cole v. Gibbons, 3 P. Wms. 290 ;
Curwyn v. Milner, reported in note to last case ;
Gowland v. De Faria, 17 Ves. 20 ;
Lord Aldborough v. Trye, 7 Cl. & Fin. 457.

Sir H. Cairns, Q.C., *Cole*, Q.C., and *Beavan*, for the defendants, argued that the market value did not depend on tables, but on the nature of the security,

Lowe v. Barchard, 8 Ves. 133.

There could be no benefit in this case to the heir, and no preservation of family estates—all would be swallowed up by incumbrances. Interest on arrears of the annuity did not invalidate the transaction,

Booth v. Leicester, 3 My. & Cr. 459.

The evidence for the plaintiff was theoretical, and founded on insufficient and, in a great measure, erroneous data.

They also argued, on the question of the decree in the suit of *Hodge v. Tynte* being a bar to relief in this suit of *Tynte v. Hodge*—that the plaintiffs and defendants in *Hodge v. Tynte* having waived their respective rights to require an answer, and to answer, the cause was in the same state as if a traversing note had been filed. The plaintiff had put in proper evidence of his incumbrances, and the decree made upon this evidence directed the receivers to keep down the annuities of Mr. Tynte and of the Reversionary Company, and any other annuities which should be certified ; and it also declared that the plaintiffs and the several defendants who should be ascertained to be incumbrancers should be entitled to add their costs to their incumbrances, making each time a distinction between the Reversionary Company and the incumbrancers who were to be afterwards certified by the Chief Clerk, and thus showing that the validity of the incumbrance of the Reversionary Company was considered as established,

Ogilvie v. Herne, 13 Ves. 563 ;

Tynte v. Hodge, 2 J. & H. 692 ; 1 N. R. 48 ;

Ford v. Tynte, 3 N. R. 559.

Roll, Q.C., in reply on the last point.

The decree only gave the receivers liberty to keep down the Reversionary Company's annuity, "as the Judge in Chambers should direct." At any rate, the decree only established that there was something due upon the company's security, which was not disputed. If the transaction, now complained of, were to be upheld, the amount due would be ascertained by calculating the gales of the annuity in arrear, and the interest due thereon. If the transaction were to be set aside, the sum which, according to the equitable principles of this Court, the plaintiff would have to pay, might, with equal propriety, be called the amount due on the security.

[THE VICE-CHANCELLOR referred to

Hodson v. Ball, 1 Ph. 177.]

22 Nov. 1864.

WOOD, V.-C., after noticing the general resemblance between the two cases, and stating the case of *Tynte v. Hodge*, said, that the transactions in question were disputed on the grounds usual in such cases. Here was an heir dealing with his reversionary interest (for his Honour could not consider the age of Colonel Tynte, or that he was accustomed to borrowing money ;—he could only regard him as an expectant heir), and the burden of proving that they gave a full value for their purchase was thrown upon the defendants. One of the grounds for the Court using its jurisdiction in cases of this kind was, the impolicy of allowing improvident heirs to destroy family estates behind their fathers' backs. Here Colonel Tynte had employed Mr. Baker, the family solicitor, and there was no evidence to show that it was intended to keep the transaction secret from his father ; indeed, Mr. Baker had written to the father, making some inquiries about the estates and the ages of certain persons. But yet there was not sufficient evidence to bring the case within *King v. Hamlet* (2 Myl. & K. 456).

Mr. *Roll*'s argument, that you must prove a market, and market value in that market, would, if such was the law, render annuities of this kind unsaleable. Another proposition of Mr. *Roll*, that you must take the value of the reversion, and then the value of an annuity secured on that reversion, as calculated by actuaries, led to Sir W. Grant's difficulty in *Gowland v. De Faria* (*loc. cit.*), which was removed by Lord Cottenham in *Lord Aldborough v. Trye*.

His Honour took the rule to be, that there must be a substantial price, and further, that the Court must be satisfied that there was no one at the time from whom a greater sum could have been procured. The calculations of actuaries and from tables was not of such weight as the practical testimony of auctioneers conversant with these transactions, who could speak to the practical value and fairness of the transaction. His

Honour said he could not help also taking judicial notice of the monetary panic during 1847. There was a quantity of theoretical evidence for the plaintiff, but no evidence that any one would have given more than was actually given, though Colonel Tynte, both before and since, had been raising money on annuities. His Honour dwelt on the immense disproportion in the results obtained from the same data, and comparing the highest and lowest values put on the annuity, said, such evidence was absurd and worthless. Here not a farthing had ever been received by either annuitant, except that the Reversionary Company had received part of the purchase-money of the Maindee estate.

In Mr. Beavan's case, the family solicitor was not employed, and Colonel Tynte was without legal advice, which, his Honour said, would make him look into that transaction more narrowly. The annuity to Mr. Beavan was at 15 $\frac{1}{2}$ per cent. on the purchase-money, instead of 13 $\frac{1}{2}$., as in the case of the Reversionary Society, but then it was subject to their annuity, which would have to be paid off before Mr. Beavan could get his money. The difference between the ages of Colonel Tynte and his father (only twenty-one years) was so small, as to render unlikely any lengthened enjoyment of the estate after the death of the father.

There was a good reason why Mr. Baker had not been employed by Colonel Tynte as his solicitor, for Colonel Tynte had just executed a mortgage to him to secure 4,800 £ ., and subsequent advances up to 6000 £ ., which was kept secret from Mr. Beavan.

In *Bromley v. Smith* (*loc. cit.*), it was said that the Master of the Rolls had decided that 6 $\frac{1}{2}$ per cent. was too much. But in *Bromley v. Smith* the chance of the reversion coming into possession was very much greater than in the present cases. The transaction in that case was of a twofold character. The transaction in 1848 was not set aside; and though it was not approved, and perhaps would not have been approved *per se*, the Master of the Rolls thought it was a criterion by which to judge the fairness of the second transaction, which was much less favourable to the heir, though his interest in the estates had become more valuable in the meantime. Now what was the first transaction there? The plaintiff sold an annuity of 450 £ . for 8000 £ ., nominally. That would appear better than in this case, but what was to be done in order to pay the annuity in the interval, before the estate came into possession? For it was obvious that during the life of the tenant for life, there would have been no means of paying the annuity as it accrued, nor would the annuitants have any means of enforcing or obtaining payment of it. In order to obviate the difficulty, the plaintiff, in that case, purchased from the Albert Insurance Company an annuity of 450 £ ., to last for five years, if the tenant for life and the plaintiff should both so long live, at the price of 1,765 £ . To put the present case on the same footing, as to relative per-centage, of *Bromley v. Smith*, you must deduct this 1,765 £ .

from the 8000 £ . advanced, and then you will have 14 $\frac{1}{2}$ per cent. on the purchase-money to secure the grantee for the space of only five years. This was the original transaction, which was not impugned, and which served, in the opinion of the Master of the Rolls, as a criterion of the unfairness of the subsequent transaction.

In the present cases, on the evidence before him, his Honour was of opinion that a full value had been given, and he must dismiss both bills with costs.

HIS HONOUR, in reply to a question from counsel as to what he thought of the effect of the previous decree in *Hodge v. Tynte*, added, that he had forgotten to mention that part of the case; but, in his opinion, *Tynte v. Hodge* was clearly a bill of review. Hodge filed a bill to realise his security, proved his case by evidence, and obtained a decree to take an account of what was due on his security. Throughout this decree, a distinction was made between the plaintiffs, whose incumbrances were treated as established, and the other incumbrancers, whose incumbrances were to be certified by the Chief Clerk. He could not accept Mr. Roll's argument, that because this Court, when it set aside a transaction of this kind, was accustomed to say that the deed was to be a security only for what was actually due, therefore a decree setting aside the deed would not be inconsistent with this decree for an account of what was due upon the security. Colonel Tynte might have set up his present case by an answer to Hodge's bill, and, if he had done so, the Court would not have made any decree, without first giving him an opportunity of filing a cross bill. The present case was a much stronger one than *Hodson v. Ball* (*loc. cit.*), which was not, as had been assumed in the argument, the case of a plaintiff filing a bill for an account as to wilful neglect and default, and then abandoning that part of the relief he had prayed. On the contrary, the plaintiff, in that case, originally only asked for and obtained a decree for the common accounts, and yet, when he filed a supplemental bill for wilful neglect and default, this was held to be in the nature of a bill of review.

The bills must be dismissed with costs.

Wood, V.-C. } *Re THE STATE FIRE INSURANCE*
25 Nov. 1864. } COMPANY (2).

Winding up—Interest—11 & 12 Vict. c. 45—
3 & 4 Will. 4, c. 42, s. 28.

Under the Winding-up Acts, 1848-9, a legal debt, payable by the company at a fixed time, will carry interest at 5 $\frac{1}{2}$ per cent.

Secus, if the debt be one upon which interest could not be recovered, independently of the winding up.

Re Hatfield Patent Cask Company (2 N. R. 502), distinguished.

This was an adjournment from Chambers, to deter-

mine whether a claim for interest made by the official manager of the Times Fire Insurance Company against the State Insurance Company, could be allowed in the winding up of the latter company under the Winding-up Acts of 1848 and 1849.

By an agreement dated the 6th of July, 1858, it was agreed that the State Company should purchase the goodwill and business of the Times Company for 36,000*l.*, and that 20,000*l.* of the purchase-money should be paid in shares, that 5,566*l.* should be set off against a debt by the Times Company to the State Company, and that the remainder should be paid in cash, by instalments, upon certain specified days in 1858, 1859, and 1861. The agreement did not provide for the payment of interest upon instalments not punctually paid.

Previously to this purchase, the two companies had been partners in various transactions. The nature of these transactions was not stated to the Court.

The official manager of the Times Company now claimed interest: (1), upon the instalments payable under the agreement of the 8th of July, 1858; and (2), upon a balance alleged to be due to the Times Company, in respect of payments made by them on account of the partnership.

Westlake, for the official manager of the Times Company.

The Winding-up Acts of 1848-9 did not take away any rights which creditors would otherwise have against the company,

11 & 12 Vict. c. 45, s. 58;

Tetrell v. Hutton, 4 H. of L. Ca. 1091, 1098;

and, therefore, if interest would be payable otherwise, it must be paid, although the company is being wound up.

The agreement is silent as to interest, but as it fixes the times for the payment of the instalments, a jury would give interest by way of damages under the 3 & 4 Will. 4, c. 42, s. 28.

By virtue of this statute, a creditor coming for a purely legal debt, is entitled to interest at 5*l.* per cent.,

Hyde v. Price, 8 Sim. 578;

Knapp v. Burnaby (V.-C. W.), 9 W. R. 785.

He also contended, that interest was payable upon the balance of the partnership accounts, though he admitted that his previous reasoning did not apply.

Druce, for the official manager of the State Company.

This case is governed by the Lord Chancellor's decision in

Re Hatfield Patent Gask Company, 2 N. R. 502, where he held that a call could not be made in a winding up under the Companies' Act, 1856, for the purpose of paying interest upon debts which did not in their nature or by the contract carry interest, such interest not being a debt.

[THE VICE-CHANCELLOR suggested that, in the present case, he might allow an action to be brought for the purpose of recovering this interest.]

Westlake, in reply.

According to the 3rd section of the Winding-up Act, 1848, the word creditor includes "every person having any debt or demand enforceable against any company in any Court of Law or Equity, or for non-payment, or non-satisfaction of which, damages could be recovered."

The 83rd section gives power to make calls for the purpose of paying "the debts and liabilities" of the company, and the 74th section enabled the Master to ascertain the creditors' debts and demands in such manner as he should think fit.

Druce stated, in answer to a question from the Vice-Chancellor, that in *Re Hatfield Company's Case* there was no fixed time for the payment of the debt.

WOOD, V.-C., said that the present case did not appear to be within the principle of the Lord Chancellor's decision. In that case the debt was one upon which no interest would have been recoverable by the verdict of a jury, and the interest was claimed merely upon the ground that a winding-up order had been made. In the present case the debt was one on which a jury would award, by way of damages, interest at 5*l.* per cent. In the Winding-up Act, 1848, he found the word "creditor" interpreted as including every person having a demand in respect of which damages could be recovered. He found (section 73) that all debts and demands were to be ascertained in the first instance by the Master, and he apprehended that a demand of this kind for interest could be ascertained without bringing an action, as the Master and the Court would know that the debt was one bearing interest at 5*l.* per cent. He also found (section 83), that calls were to be made for paying the debts or liabilities of the company, and he considered it clear, that the claim for interest became a debt as soon as it had been brought in and allowed. These considerations distinguished the present case from that before the Lord Chancellor, and he should allow interest at 5*l.* per cent. on the instalments of the purchase-money, but not on the balance due on the partnership accounts, which did not come within the same principle.

Notes.—The Companies' Act, 1856, simply uses the terms "creditor" and "debts," without defining them, and therefore the Vice-Chancellor's decision would probably not apply to a case arising under that Act. The Companies' Act, 1862, like the Winding-up Act, 1848, uses the term "debts and liabilities" (section 102), as to the power to make calls; and provides (section 159) that "claims sounding in damages" shall be admissible to proof against the company.

COMMON LAW.

Q. B. }
16 Nov. 1864. } WEBB v. BARKER and Others.

*Landlord and Tenant—Action by Reversioner—
Permanent Injury.*

A loss of tenants by their leaving a house, in consequence of disturbing noises, and inability to relet, is not a permanent injury, so as to support an action by the reversioner.

The declaration stated that the plaintiff was occupier of a dwelling-house, No. 12, Cooper's Row, Tower Hill, part of the house being occupied by his tenants, and part by himself, and that the defendants wrongfully made divers loud, deafening, and discordant sounds and noises near the house, and which entered and penetrated and disquieted the plaintiff and his family and tenants in their occupation or business, so that some of the tenants had left it, and he was unable to relet it. Demurrer.

R. E. Turner, for the defendants.

The declaration shows no ground of action by the landlord, the reversioner. The injury must be permanent, and there is nothing in the case to show the continuation of the noises, and no averment of their continuation in the declaration. In *Bell v. The Midland Railway Company*, 10 C. B. (N. S.) 278, Mr. Justice Willes, in giving judgment, cited Comyn's Digest, "Disturbance," A 6; but there the cases are all for malicious injuries. The action by a reversioner must be for a permanent injury,

Simpson v. Savage, 1 C. B. (N. S.) 347.

Gray, Q. C., for the plaintiffs.

The tenants leave and the landlord cannot relet, and consequently the rent is lost, and the rent is an element to be taken into consideration in considering the reversionary value.

[COCKBURN, C.J.—He should sue for special injury for loss of tenants.]

I submit it is sufficient if it may prove permanent,

The Metropolitan Association for Improving Dwellings v. Patch, 1 C. B. (N. S.) 504.

COCKBURN, C.J.—We cannot overrule the latest cases on this point. All these decide that the action by a reversioner must be for one which is of a permanent character.

Judgment for the defendants.

Q. B. }
18 Nov. 1864. } COLLINS v. WILLMOTT.

*Pleading—Landlord and Tenant—Agreement
to grant a Lease—Averment of Tender.*

The defendant agreed to take a house of the plaintiff, and to execute a lease for the same terms as the plaintiff held, less ten days. The declaration averred that the plaintiff accepted the defendant as tenant, and tendered a lease for the same term for defendant's signature, but it contained no averment that the plaintiff had authority to grant, or was ready and willing to execute a lease. Declaration held good.

Demurrer to a declaration.

Declaration.—That the defendant agreed with the plaintiff in manner following, that is to say, that he, the defendant, would take a certain house of the plaintiff, from the day of, &c., and execute a lease for the same term as the plaintiff held the said house, minus ten days, and pay a premium of 150*l.* in the following manner, that is to say, 100*l.* down, and would give a bill of exchange for the residue, at three months, &c. And the said defendant agreed to pay a deposit of 10*l.* on account of the purchase-money, and to complete the same on or before the 24th of March then next ensuing, the expense of the said lease to be paid, &c., &c. And the said agreement was signed by the said defendant, and the said deposit of 10*l.* paid by him in pursuance thereof, and the plaintiff then accepted the defendant as tenant of the said house; and although the plaintiff in pursuance of the said agreement, on the 24th of March, named in the said agreement, tendered a lease of the said house for the same term he the plaintiff held, minus ten days, to the defendant, for the defendant's signature, yet the defendant broke his agreement, and wholly refused, &c.; and has refused to sign and execute the same, and has not paid the plaintiff the said premium of 150*l.*, and not given the said bill of exchange, as in the said agreement provided, and wholly refuses so to do, &c., &c.

Ground of demurrer.—The declaration contained no averment of readiness and willingness to grant the lease.

H. T. Cole, in support of the demurrer.

The declaration shows no ground of action, since it contains nothing to show that the plaintiff had power to grant that which he agrees to grant, and therefore no consideration for what he professes to do,

De Medina v. Norman, 9 M. & W. 820.

Woollett, contra, was not called on.

BY THE COURT.—The declaration is sufficient. It says, that the plaintiff tendered a lease to the defendant for the same term as he held; that means, that all that was necessary to make it a lease, was done by the plaintiff.

Judgment for the plaintiff.

Q. B. { REGINA v. THE MAYOR, ALDERMAN, AND BURGESSES OF THE BOROUGH OF ABERAVON.
16, 19 NOV. 1864.

Charter of Incorporation—Borough—Petition to Crown—Inhabitant Householders—Majority—7 Will. 4 & 1 Vict. c. 78, s. 49.

As soon as a petition for a charter of incorporation signed by an absolute majority of the inhabitant householders of a borough is presented to the Crown, the power to the Crown to grant a charter immediately attaches, under the 49th section of 7 Will. 4 & 1 Vict. c. 78, and is not divested by a subsequent petition against a charter, though a greater number of the inhabitant householders sign the second than the first.

1st. In this case a declaration in *scire facias* was filed by permission of her Majesty's Attorney-General, for the purpose of having a charter of incorporation granted by her Majesty to the borough of Aberavon, in the county of Glamorgan, as hereinafter mentioned, cancelled, vacated, and disallowed, on the ground that the inhabitant householders of the said borough did not petition her Majesty to grant to the inhabitants of the borough a charter of incorporation pursuant to the statute of 7 Will. 4 & 1 Vict. c. 78, s. 49. The defendants pleaded that the inhabitant householders of the borough did so petition, on which issue was joined, and at the trial before the Lord Chief Justice of England, at the sittings at Westminster, after last Hilary Term, a verdict was taken for the Crown, subject to a special case, to be stated for the opinion of this Court, the parts of which material to this report are as follows :—

2nd. The borough of Aberavon is a borough by prescription under the name of the portreeve, aldermen, and burgesses of the borough of Avon, otherwise Aberavon, in the county of Glamorgan. It is not one of the boroughs enumerated in either of the schedules (A & B) to the Municipal Corporation Act, 5 & 6 Will. 4, c. 76.

3rd. On the 20th of September, 1859, a petition was presented to her Majesty in Council from certain inhabitants of the borough, praying for a charter of incorporation. On the 29th of October, 1859, a counter-petition praying that such charter of incorporation might not be granted, was presented to her Majesty in Council from other inhabitants of the borough. The number of inhabitant householders including compound householders at the respective times of presenting the said petitions was 501.

4th. The Lords of the Privy Council directed Captain Donnelly, R. E., to hold an inquiry in the borough as to the number of inhabitant householders who had signed the said respective petitions for and against the charter, and upon their several assessments, and the circumstances under which the charter of incorporation was prayed for and opposed.

This inquiry was held accordingly, and on the 1st of February, 1860, Captain Donnelly made a report thereon.

It is agreed for the purposes of this case that the facts therein are true.

5th. After considering the said report, and after obtaining the opinion of the then Attorney and Solicitor-General to the effect that "compound householders" were not inhabitant householders within the meaning of the statute 7 Will. 4 & 1 Vict. c. 78, s. 49, the Lords of the Privy Council advised her Majesty to grant a charter of incorporation to the said borough of Aberavon, and the same was granted accordingly, bearing date the 2nd day of July, 1861. A letter, of which the following is a copy, was sent to the attorney for the said ancient corporation on the 4th of July, 1860 :—

"SIR,—I am directed by the President of the Council to inform you as the attorney for the portreeve, aldermen, and burgesses of Aberavon, that his Lordship has received a report from the law officers of the Crown stating that they are of opinion that the compound householders, described in the report of Captain Donnelly, whose rates are paid by their landlords, ought not to be considered as inhabitant householders within the meaning of the 1 Vict. c. 78, s. 49, nor would they be reckoned in the number of petitioners for or against a charter of municipal incorporation. The Lord President is also advised that the property possessed by the present corporation of Aberavon would not, in the event of a new charter being granted, become *ipso facto* transferred to the new corporation, and moreover that it could not be so transferred by virtue of any provision contained in such new charter.

"His Lordship directed me to communicate the foregoing opinion with respect to the corporate property to Mr. Jones, the chairman of the committee of owners and ratepayers, who, in reply, has stated that the principal ratepayers have been consulted in the matter, and that they are unanimous in maintaining that it would be desirable to have a charter of incorporation for Aberavon.

"The Lord President, therefore, considering that there is a clear majority of petitioners in favour of the grant of a charter, and that these petitioners still urge their petition after the opinion of the law officers respecting the corporate property has been communicated to them, sees no reason for recommending her Majesty any longer to withhold her assent to the prayer of the petitioners for a charter of incorporation for Aberavon.

"The charter will be framed so as to include the whole of the parliamentary borough,

(Signed) "ARTHUR HELPS."

The case then went on to state that the prosecutor and many of the inhabitants of the said borough had resisted and opposed certain assessments and other proceedings which had been taken under the said alleged charter.

The question for the opinion of the Court was, whether the verdict on the said issue joined is to be entered for the Crown or for the defendants, and the verdict is to be entered as the Court shall direct.

Captain Donnelly's report, after stating that at the inquiry held before him both sides were represented by legal advisers, and that it was contended on behalf of the petitioners against a charter that the compound householders—namely, those who occupy houses, the owners of which alone are rated in respect of them under the 13 & 14 Vict. c. 99—were entitled to petition as inhabitant householders, within the meaning of section 49 of 7 Will. 4 & 1 Vict. c. 78, continued as follows :—

"123 persons have signed both petitions, and their names were expunged by mutual consent. There was considerable difficulty in arriving at an exact result; but after numerous signatures had been struck off for various reasons, the following was agreed to :—

"FOR A CHARTER.

| | No. | Assessed at. |
|------------------------------------|-----|--------------|
| | | £ s. d. |
| Male Ratepaying Householders | 69 | 1,161 2 2 |
| Female ditto | 6 | 58 18 0 |
| Male Compound Householders | 83 | 256 15 4 |
| Female ditto | 10 | 27 17 2 |
| | 168 | 1,499 7 8 |

"AGAINST A CHARTER.

| | No. | Assessed at. |
|------------------------------------|-----|--------------|
| | | £ s. d. |
| Male Ratepaying Householders | 40 | 584 2 8 |
| Female ditto | 15 | 84 11 0 |
| Male Compound Householders | 179 | 865 0 6 |
| Female ditto | 21 | 61 11 2 |
| | 255 | 1,595 5 8 |

"It will be seen from the above—

"1st. That excluding compound householders there is a majority of male rate-paying householders of twenty, and an excess of assessment of 576*l.* 1*s.* 6*d.* for the grant of a charter; and that if females be included, this majority is reduced to thirteen.

"2nd. That if compound householders be considered inhabitant householders, there is a minority of twenty-six for the grant of a charter, but an excess of assessment of 478*l.* 1*s.*; and that if females of both classes be included, this minority is increased to forty-four, but still with an excess of assessment of 404*l.* 2*s.* 5*d.*

"Evidence was given of a largely attended meet-

ing held in Aberavon in June, 1859, to take into consideration the advisability of the presentation of a petition for the grant of a charter. This meeting had been summoned by handbills and the town crier, in Welsh and English, and the resolution unanimously adopted by the meeting in favour of the presentation of a petition was urged in proof of the majority of inhabitant householders being in favour of it. It was, however, contended that it was not a meeting of inhabitant householders, and it certainly appeared that neither the chairman nor the persons who proposed and seconded the resolution were inhabitant householders; that the greater proportion were only owners and occupiers, and that, when the resolution was put, there was neither a show of hands nor a poll, but that, there being no dissentient voice, it was declared carried by the chairman; and though the common attorney of the present corporation had proposed the vote of thanks to the chairman, and the leading persons at the meeting were large ratepayers, the whole meeting was, it was urged, informal and irregular, and could not be taken as any indication of the feelings of the inhabitant householders.

"The portreeve, aldermen, and burgesses of the present corporation also petition in their corporate capacity against the grant of a municipal charter. The influence which they can bring to bear has most probably been the reason why so many persons, after having signed the petition for the grant, have signed the one against."

Section 49 of 7 Will. 4 & 1 Vict. c. 78, enacts, "That if the inhabitant householders of any town or borough in England or Wales shall petition his Majesty to grant to them a charter of incorporation, it shall be lawful for his Majesty by any such charter, if he shall think fit, by the advice of his Privy Council, to grant the same, to extend to the inhabitants of any such town or borough within the district to be set forth in such charter, all the powers and provisions of the said Act" (meaning 5 & 6 Will. 4, c. 76), "for regulating corporations, whether such town or borough be or be not a corporate town or borough, or be or be not named in either of the schedules to the said Act."

Lush, Q.C. (Prentice, with him), for the prosecutor. The Crown had no power to grant the charter. The inhabitant householders did not petition, for there was a greater number of petitioners against than for the charter, if the compound householders are included, as I say they ought to be. Compound householders are clearly inhabitant householders within the 49th section of 7 Will. 4 & 1 Vict. c. 78. See

5 & 6 Will. 4, c. 76, s. 9, and

13 & 14 Vict. c. 99, s. 7.

Bovill, Q.C. (Giffard, with him). It will be seen from the figures in the case, that, whether compound householders be reckoned or not, the petition for a charter was signed by an absolute majority of the inhabitant householders.

1st. If compound householders are included, 163 added to the 123 names which also signed the petition for, give 291, which is a clear majority out of 501.

2nd. If compound householders are excluded, then subtracting 243 compound householders from 501, 258 inhabitant householders are left entitled to petition. Of these $69 + 6 + 123 = 198$, signed the petition for, being a clear majority out of 258.

Thus there was a petition for a charter within the meaning of the statute, and therefore the Crown had power to grant the charter, for the power vested in the Crown as soon as the first petition was presented, and could not be divested by any subsequent counter-petitions.

The point is settled by

Rutter v. Chapman, 8 M. & W. 1; and

Regina v. Boucher, 3 Q. B. 641.

What was done by the Privy Council afterwards, was merely to obtain information for their own guidance, and was for their discretion. Further, the petition against was signed by fewer inhabitant householders than the petition for: since compound householders are not entitled to petition.

[COCKBURN, C.J.—It is not necessary in this case to decide whether compound householders are entitled to petition or not.]

He was then stopped.

Lush, Q.C., in reply.

The Crown did not act upon the first petition, but upon a consideration of both, and a mistaken opinion of the law-officers that compound householders were not entitled to petition. If two petitions are presented contemporaneously, one for and one against a charter, and the one against is signed by a larger number than the one for, how can the one for a charter be held to represent the wishes of the majority?

[COCKBURN, C.J.—That is not the case here. The petition against was a month after.]

They were virtually contemporaneous, for the Crown did not act till both were before it. Further, the actual majority of inhabitant householders who signed the petition for a charter, can only be made up by adding the 123 names which were struck off at the inquiry. These 123 persons signed the petition against, and their signatures to the petition for may have been forged.

[COCKBURN, C.J.—There is nothing to show that.]

COCKBURN, C.J.—I think our judgment must be in favour of the charter. The words in section 49 of 7 Will 4 & 1 Vict. c. 78, "if the inhabitant householders shall petition," mean, in my opinion, if the majority of the inhabitant householders petition. It is not said in that Act that all the inhabitant householders shall petition, and there is no reason why the general rule of public bodies—that the minority must yield to the majority—should not prevail here. The only question, then, is, was there a petition for the charter signed by a majority of inhabitant house-

holders? It appears from the case that there was. It is true, that a month afterwards many of those who signed that petition changed their minds and signed a petition against a charter. But that is immaterial, because as soon as a petition signed by a majority of the inhabitant householders was presented to the Crown, that moment the power to grant a charter attached, and could not be divested by a subsequent petition against the grant of a charter. What the Crown did afterwards, was, to ascertain the fact whether a certain petition praying for a charter, was signed by a majority of the inhabitant householders, and really represented their wishes. It was entirely for the discretion of the Crown to decide whether or not it would inquire into all the circumstances which attended the case or not. The only question for the Crown was the same as that before us now—was there or not a petition for a charter signed by a majority of inhabitant householders? It appears that there was; and, therefore, we find the issue in favour of the defendants. It is not as if two petitions had been presented contemporaneously, as Mr. Lush argued, for the petition against was more than a month after.

OZOMPTON, J.—I am of the same opinion. We are a jury to decide a question of fact. The prosecutor says that the inhabitant householders did not, and the defendants say that the inhabitant householders did, petition the Crown for the grant of a charter. Issue is joined on that, and all we have to say is, was there such a petition sent up? Now, I hold it as a settled rule of law, in such a case as this, that it is for the jury to decide the question of fact, whether the petition is fairly the petition of the majority of the inhabitant householders; that is, whether it fairly represents their wishes, on the principle that the decision of the majority must bind the minority. Mr. Lush contended that the Crown did not act upon the first petition. But if the Crown had the power to act upon it, it is immaterial whether it acted upon it, or upon other considerations, or in pursuance of the opinion, whether right or wrong, of its law-officers, as to compound householders. But be that as it may, the question whether or not the Crown in fact acted or professed to act upon the first petition, is not before us now. From the facts it appears that a public meeting is held, at which no one makes any protest, and the result of that meeting is, that a petition goes up signed by a majority of inhabitant householders, whatever view is taken of the question of compound householders. Afterwards a vast number of those people changed their minds. It is not stated that all or any of those 123 names appended to the petition were forgeries, and it would be monstrous for us to say that they were so; we presume, in the absence of any evidence to the contrary, that they were all genuine. I think, then, that a petition was presented to the Crown, signed by an actual majority of the then inhabitant householders, within the meaning of the statute, and

that the power to grant a charter at once attached to the Crown. All the rest that the Crown did afterwards was merely for its own information, and it was entirely in the discretion of the Crown to hold that inquiry, and to grant the charter or refuse it.

MELLOR and SHEE, JJ., concurred.

Judgment for the defendants.

Q. B. { REGINA (on the Prosecution of
19, 23 Nov. 1864. { MAULE) v. THE LOCAL BOARD
OF HEALTH FOR THE BOROUGH
OF GODMANCHESTER.

*Public Health Act, 1848, 11 & 12 Vict. c. 63,
s. 43—Watercourse—Sewer—Drains—Local
Board of Health—Commissioners under Local
Inclosure Act—41 Geo. 3, c. 109, s. 10.*

A natural watercourse, within the ambit of a borough, which for the greater part of its length flowed through and naturally drained private agricultural lands of certain landowners, received, shortly before it emptied itself into a river, the drains of two or three inhabited houses. Between the years 1802 and 1809, the Commissioners appointed under a Local Inclosure Act, which incorporated 41 Geo. 3, c. 109 (the General Inclosure Act), acting under the Local Act, set out, appointed, ordered, and directed it, and with the consent and at the expense of the said landowners caused the channel of it to be cleared out, widened, and deepened, so as better to drain part of the said lands. Afterwards, some of the said landowners made slight deviations in its course. It was now foul and a nuisance, and injurious to health; and it had overflowed and damaged a public way and certain lands adjoining:—

Held, that it did not vest in the Local Board of Health for the borough, under section 43 of 11 & 12 Vict. c. 63: since, if it was a sewer at all, it came within the exception of "sewers made and used for the purpose of draining, preserving, or improving land, under any local or private Act of Parliament," by virtue of the aforesaid proceedings of the Commissioners:

Semble, that 11 & 12 Vict. c. 63, did not intend so to interfere with private rights as to vest such a watercourse in the Local Board.

This was a writ of *mandamus* to the above Board of Health, commanding them to cleanse, &c., a certain drain, sewer, or watercourse, called Stonehill Brook, pursuant to the Public Health Act, 1848, to which they made a return, of which the parts material to this report were as follow:—

"That the said drain, sewer, and watercourse, called Stonehill Brook, was not nor is a sewer vested in or under the management and control of us, the said Local Board, nor was nor is it our duty, under the provisions of the Public Health Act, 1848, to cause the said drain, &c., to be scoured, cleansed, emptied, or

kept, so as not to be a nuisance or injurious to health."

To this part the prosecutor pleaded the first plea, traversing all the allegations.

The return then further certified, "that the said drain, &c., was and is a sewer made and used for the purpose of draining, preserving, or improving land, under a certain Act of Parliament (the Godmanchester Inclosure Act), and that the said sewer, at the times in the said writ mentioned, ought to have been, and still ought to be, repaired, scoured, cleansed, emptied, and kept by and at the expense of all the proprietors of the lands and grounds which were divided and inclosed by virtue of the said Act of Parliament, and not by us, the said Local Board."

To this part the prosecutor pleaded the second plea, traversing all the allegations.

Upon these pleas issue was joined; and at the trial, before Wightman, J., in 1863, at the Summer Assizes for the County of Huntingdon, it was ordered by consent that the case be referred to an arbitrator to settle certain facts in a special case, of which the parts material to this report are as follow:—

1st. In 1802 the Godmanchester Inclosure Act was passed, intituled An Act for Dividing and Inclosing Certain Open and Common Fields, Meadows, Lands, Commons, and Commonable Places, within the Parish of Godmanchester, which Act incorporated the General Inclosure Act, 41 Geo. 3, c. 109.

2nd. The Commissioners appointed under the Godmanchester Inclosure Act made their award under it on the 23rd of June, 1809, and by it they did set out and appoint, order, and direct, among other things, "one other public drain or watercourse four feet wide, beginning at the London turnpike-road into and over an allotment to the Dean and Chapter (meaning the Dean and Chapter of Westminster), and their lessee along Shooter's Hill and thence through and over the allotments to Samuel Blechley, Lady Olivia Sparrow, and John Martin to and across Graveley Way, and thence over an allotment to George Maule into an ancient watercourse leading into the town of Godmanchester along part of the said town, and thence into the river Ouse."

And the said Commissioners did by their award direct (*inter alia*), that all such drains and bridges shall be made and for ever maintained, supported, scoured, and kept in repair by and under the directions of the surveyor of the highways for the time being of the said parish of Godmanchester, at the expense of all the proprietors of lands and grounds divided and inclosed by virtue of the said Act in equal proportions.

3rd. The said drain or watercourse is the one mentioned in the award hereinafter set out, and is known by the name of Stonehill Brook, and is the one in question in this *mandamus*.

4th. Stonehill Brook is situate within the corporate borough of Godmanchester, a district within the meaning of the Public Health Acts, exclusively con-

sisting of the whole of the said corporate borough, within and for which the defendants are the Local Board of Health under the said Acts.

5th. In pursuance of the above order of reference the arbitrator made his award, of which the material parts are in substance as follow :—

The Stonehill Brook commences at the road called the London Road, and passing from thence through land called and known as the Dean and Chapter's land, thence through land called Blechley's Farm, thence through land called Lady Olivia Sparrow's land, thence through the lands of various proprietors, crossing a road called West Street, and terminating in the river Ouse. The whole length of its course between the London Road and the river Ouse is about one and a half miles. The water of Stonehill Brook between the London Road and West Street is solely supplied by the drainage natural and artificial of a considerable area of cultivated soil, but at West Street the drains of two or three inhabited houses empty themselves into the brook, and between West Street and the river Ouse the water of the brook stands at the level of that of the Ouse. With the exception of the drains at West Street just mentioned no drains other than the drains underground and open of purely agricultural land discharge themselves in the brook. The channel of the brook is the natural channel of a certain natural stream except so far as its character is altered by the facts next mentioned. The Inclosure Commissioners, acting under a Local Inclosure Act of 43 Geo. 3, between the years 1802 and 1809, cleared out the channel of the said natural stream, and in various places along its course somewhat widened and deepened it, to render it more efficient as a means for draining a portion of the tract of land which was subject to the provisions of the said Act. Afterwards the owner of Blechley's Farm, for greater convenience in subdividing his fields, diverted the course of the said natural stream by cutting for it an artificial channel which commenced at the point where the said natural stream entered Blechley's Farm from the Dean and Chapter's land, and which artificial channel, after running a length of about seven chains, re-entered the old channel, the intervening portion of the old channel being filled up and destroyed. For the same purpose, and about the same period, the owner of Lady Olivia Sparrow's land also diverted the course of the said natural stream by making for it an artificial channel, which commenced at the point where the said natural stream passed from Blechley's Farm to Lady Olivia Sparrow's land, and which artificial channel, after running a length of about eighteen chains, re-entered the old channel very nearly at the further boundary of Lady Olivia Sparrow's land, the old channel being partially filled up, but being left and still remaining incapable of acting as an escape channel for surplus waters. The natural channel of the said natural stream, so altered and affected as just described, con-

stitutes the existing channel of Stonehill Brook. The width of the channel of Stonehill Brook varies from about fourteen feet at its upper extremity to about fifteen feet at its lower, and its depth from about three feet to about five feet between the same limits. Before the inclosure under the said Inclosure Act, Stonehill Brook was cleared out and repaired, sometimes at the joint expense of all the owners of the land subject to the provisions of that Act, and sometimes by paupers of the parish of Godmanchester under the direction of the overseer of the poor of that parish for the time being, and paid by him out of the general poor-rates of that parish. After the said inclosure for a short time, Stonehill Brook was cleared out and repaired when necessary by the paupers of the parish of Godmanchester under the direction of the overseer of the poor of that parish for the time being, and paid by him out of the general poor-rates of the parish; but for the last thirty years or thereabouts, it has been cleared out and repaired by the owners of the lands through which it passes, each doing that portion of it which traverses his own land.

6th. It is admitted that the said drain, sewer and watercourse called Stonehill Brook, was and is in a foul, unclean, and improper state and condition, so as to be a nuisance and injurious to health, as in the writ of *mandamus* alleged.

7th. It is also admitted that the said drain, sewer and watercourse, for want of being properly scoured, cleaned, emptied and kept, had become and was before and at the time in that behalf in the writ mentioned, and still is liable to overflow and damage, and then had overflowed and damaged the land of some of the Queen's subjects adjoining and near to the said drain, sewer and watercourse, and the public way called Graveley Way, as in the writ of *mandamus* alleged.

8th. The question for the opinion of the Court is, whether the prosecutor or the defendants is or are entitled to the verdict on the first and second pleas to the return to the writ. The verdict on these pleas is to be entered as the Court shall direct, it being agreed that the verdict is to be entered for the prosecutor on the third and fourth pleas to the return.

Section 43 of the Public Health Act, 1848, 11 & 12 Vict. c. 63, enacts "that all sewers, whether existing at the time when this Act is applied, or made at any time thereafter (except sewers made by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land, and sewers under the authority of any commissioners of sewers appointed by the Crown), together with all buildings, works, materials and things belonging or appertaining thereto, shall vest in, belong to, and be entirely under the management and control of the Local Board of Health."

Section 2 enacts "that the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.

"The word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies."

Section 10 of 41 Geo. 3, c. 109 (incorporated by the Godmanchester Inclosure Act) enacts that such Commissioners shall "set out and appoint such private roads, &c., *ditches, drains, and watercourses*, &c., in, over, upon and through, or by the sides of the allotments to be made and set out in pursuance of such Act" (meaning the Local Inclosure Act), "as they shall think requisite," and that "the same shall be made, and at all times for ever thereafter, be supported and kept in repair by and at the expense of the owners and proprietors for the time being of the lands and grounds directed to be divided and enclosed, in such shares and proportions as the Commissioner or Commissioners shall in and by his or their award order and direct."

Keane, Q.C. (Douglas Brown and Maribby with him), for the prosecutor.

1st. This is a sewer vested in the Local Board under section 43 of 11 & 12 Vict. c. 63. It is clearly a sewer within the interpretation clauses, for it drains more houses than one. By section 46, the Local Board are bound to cleanse it.

2nd. This is not within any of the exceptions mentioned in section 43. It is not made by a person for "profit." As to meaning of "profit," see

Coe v. Wise, 4 N. R. 352; 38 L. J. Q. B. 281.

3rd. It is not a sewer "made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament." What was done by the Commissioners under the Godmanchester Inclosure Act, with which is incorporated section 10 of 41 Geo. 3, c. 109, did not amount to this, for the provisions of that section were not followed. See

Earl of Falmouth v. Richardson, 3 B. & C. 837.

Compare section 68 of 21 & 22 Vict. c. 98, which repealed section 145 of 11 & 12 Vict. c. 63.

4th. Even if made, the case shows it was not used for the purpose of draining, &c., so as to bring it within the above exception.

5th. It is clearly not within either of the other exceptions.

6th. The Local Board might cause this to be cleansed by the owner or occupier of any premises whereon the nuisance exists,

11 & 12 Vict. c. 63, s. 58.

7th. If this sewer is held not to vest in the Local Board, it will frustrate the intention of the Metropolis Local Management Act, 18 & 19 Vict. c. 120.

Joseph Brown (Metcalf with him), for the defendants.

If this sewer were held to be vested in the Local Board, the effect would be to cast three-fourths of the burden of the rates on the householders, who derive hardly any benefit from this watercourse, and only one-fourth on the landowners, who get nearly all the benefit, section 55 of 21 & 22 Vict. c. 98, repealing sections 88 and 95 of 11 & 12 Vict. c. 63. This would be so monstrous, that it is clear the Legislature cannot have intended it.

1st. This is not a sewer within section 43. The preamble of 11 & 12 Vict. c. 63, shows that it was passed "for improving the sanitary condition of towns and populous places." The prosecutor ought to show that the few drains which run into it do so of right, and the time during which they have done so ought to be shown.

[COCKBURN, C.J.—If these agricultural lands had been built on, and the drains from the houses ran into it, would it then have been a sewer vested in the Local Board?]

Yes, as in the case of the Fleet sewer; but it was not so here.

2nd. It is not a sewer of such a public nature as to vest it in the Local Board. Sections 44 and 58 of 11 & 12 Vict. c. 63, show that section 43 never intended to vest in the Local Board private sewers of landowners. If it did so intend, the Board would be obliged to "cover" miles of an open watercourse in the country, which is absurd. This is illustrated by

Paul v. James, 1 Q. B. 832.

3rd. This watercourse, if within section 43 at all, comes within one of the exceptions, probably that of "sewers made and used for the purpose of draining," &c. This is clear from what was done under the Godmanchester Inclosure Act in 1809.

4th. This *mandamus* directs the Local Board to cleanse the whole length of the watercourse, and if the Court holds that they are only bound to cleanse that part which is in the town, the *mandamus* will be bad altogether,

Regina v. The Tithe Commissioners, 14 Q. B. 459.

[CROMPTON, J.—How can that arise here? We have only to say for which party the verdict is to be entered on the first and second pleas.]

Keane, Q.C., in reply.

[COCKBURN, C.J.—Do you say that every natural stream, naturally draining agricultural lands within the ambit of a borough in the way this watercourse does, was vested in the Local Board as soon as 11 & 12 Vict. c. 63, s. 43, was passed?]

Yes.

COCKBURN, C.J.—I think our judgment should be for the defendants. I entertain very serious doubts whether the Public Health Act, 1848, which vests certain sewers in the Local Board was intended to include sewers which are private property. It would be most strange if the Board were enabled to interfere with private rights without making any sort of compensation to the owners. Here the *mandamus* is to compel the Board to take a watercourse without any reference to the proprietors. What would be the position of a proprietor in this case owning the parts of the stream both above and below the houses which drain into it in West Street, supposing the owners of those houses had acquired no right to drain into it, and supposing an action were brought by the proprietor for the purpose of stopping that drainage, if the Local Board were then to step in and say, "Stop, all is ours!" Such a consideration as this shows that the statute never can have intended to interfere with private rights. Otherwise we should be obliged to hold that a stream, the greater part of which flows through agricultural lands, simply because just at the lower end a few houses drain into it, is therefore intended to be wholly used as a sewer, and to vest as such in the Local Board. Such a decision would involve most serious consequences in the destruction of private rights. But there is no need to decide that point in this case, because I think that this stream, if within the 43rd section of the Public Health Act at all, comes within the exception of sewers "made and used for the purpose of draining, preserving, or improving land, under any local or private Act of Parliament." I certainly do not think that a stream which flows through agricultural lands is vested in the Local Board simply because a few houses drain into the lower end of it. But we need not rest our decision on that, because if this stream was not private property, it was only not so because the Commissioners under the Local Inclosure Act, set it out. Then the 10th section of 41 Geo. 3, c. 109, says, that upon their so setting out and appointing, &c., "the same shall be made, and at all times for ever thereafter be supported and kept in repair, by and at the expense of the owners and proprietors for the time being of the lands and grounds," &c. It is found indeed in the award contained in the case, that the Commissioners themselves cleared out the channel, &c., but it appears from the rest of the case that they followed the provisions of the Local Act, which incorporated 41 Geo. 3, c. 109, and, as a jury, we must find that even if done by the Commissioners themselves, it was done on behalf of, and at the expense of, the landowners whom the Act directs to do it. It has been decided in this Court, that Commissioners acting under 41 Geo. 3, c. 109, in making private roads, if they make them themselves, cannot make a rate to reimburse themselves. We cannot suppose, therefore, that the Commissioners here did an illegal act, and at this lapse of time we infer that everything was done rightly. I

think, therefore, that this watercourse comes within the exception I have mentioned. We need not decide now, whether the 43rd section of 11 & 12 Vict. c. 63, intended to vest in the Local Board a natural watercourse such as this, within the ambit of a borough, for the greater part of its length flowing through and naturally draining private agricultural lands, which at its lower end is drained into by a few houses, but I entertain no doubt that it was not intended so to vest.

CROMPTON, J.—It is very difficult to understand the clauses of this Public Health Act, but I agree with my Lord, and for very much the same reasons. The question before us is, first, has this watercourse vested in the Local Board? and, secondly, has the duty accrued to them to repair and cleanse it under the Act? It has not been shown to my satisfaction that it has so vested. The foundation of Mr. Keane's argument was that the Legislature intended to vest private streams such as this in the Local Board, but I do not think it did intend to vest in the Board a natural watercourse within the ambit of a borough such as this, flowing for most of its length through, and naturally draining private agricultural lands, simply because just before it flows into the river, it receives the drains of a few houses.

Now has this ever been made a sewer? Nothing has been done to make it so, except what was done by the Commissioners under the local Act. I doubt, indeed, whether deviation is a "making"; a little alteration is not a "making." But if it was so made by the Commissioners, as a jury we ought to find from the case that it was rightly done, and with the sanction of the landowners. I think, therefore, that if this stream is a sewer at all, it was "made" within the exception.

SHEE, J.—I think, first, that this stream is not a sewer at all within section 43 of 11 & 12 Vict. c. 63; but that, secondly, if it is, it comes within the exception.

Judgment for the defendants.

Q. B. }
10, 25 Nov. 1864. } PYE v. BUTTERFIELD.

Evidence—Answers to Interrogatories involving a Forfeiture of Estate.

A man cannot be compelled to answer interrogatories, the answers to which expose him to a forfeiture of estate.

Rule obtained by *Needham*, to show cause why the defendant should not answer certain interrogatories in an action of ejectment. The facts of the case were as follows:—

The defendant was tenant to the plaintiff under a lease which contained a covenant not to underlet or assign: the defendant having underlet, the plaintiff brought ejectment, and delivered interrogatories to the

defendant, one of which was: "Had the defendant underlet or assigned the premises?"

Laxton now showed cause.

I submit the "forfeiture" in the 46 Geo. 3, c. 37, followed, as it is, by the words, "of any nature whatsoever," applies to a forfeiture by breach of covenant,

May v. Hawkins, 11 Exch. 210;
Chester v. Wortley, 17 C. B. 410;
 2 Phillips on Evidence, 392;
 Common Law Procedure Act, 1854;
Bartlett v. Lewis, 31 L. J. C. P. 230;
Wigram on Discovery, 81 (2nd ed.);
Fane v. Atlee, 1 Eq. Ca. Abr. 77;
Mitford's Equity Pleadings, 153;
Uxbridge v. Stavelon, 1 Ves. Term Rep. 56;
Best on Evidence, 756 (3rd ed.);
 2 Taylor on Evidence, 1236 (Ed. 1864).

Needham, in support of the rule,

Lucas v. Wood, 3 Atk. 260;
Hare on Discovery, 145;

show that Courts of Equity allow discovery in the case of conditional limitations on a gift of an estate.

COCKBURN, C.J.—I think this rule should be discharged: I do not think the statute of George the Third, in which the words "forfeiture" and "penalty" are used together, applies here; and, if it did, I should have doubted whether its provisions had reference to cases of forfeiture by breach of covenant. This case arises by reason of a contract whereby one person shall have the right to the possession of certain premises of another, unless he does certain things. In older language that is called a forfeiture, but wrongly, I think, and my opinion is, that it is not so. The exercise, however, of the powers of discovery vested in this Court, conferred by the Common Law Procedure Acts, is to be governed by those rules and principles by which, in a long series of years, the Courts of Equity have been guided. The Legislature in transferring to us these new powers, must be taken to have invested those powers with the principles and rules with which Courts of Equity had administered those powers. Whether or not the Legislature had so limited our jurisdiction, I am of opinion that, as a matter of legal obligation or of discretion, we must abide by those rules by which that branch of our jurisprudence has always been governed. It was an established and long fixed rule in Equity, that those discoveries by means of interrogatories, the answers to which involved a forfeiture of estate should not be allowed, and I cannot think that a Court of Law could in its discretion, even if it had the power, disregard such a rule. These interrogatories would directly contravene the principle involved in the rule, and we cannot compel the defendant to answer them.

CROMPTON, J.—I am not disposed to say that we are bound in all respects by the exact practice or procedure of Courts of Equity as to discovery, but their

practice ought to be taken as a great guide to us in matters of discovery. This seems to be a principle or rule adopted originally by the Courts of Equity from the Courts of Common Law; it must be looked on as a principle of the Law of Evidence, and at Common Law, the question would arise only as regarded witnesses, and at Common Law the parties were excluded from being witnesses; but the principle was, that a witness could not be compelled to answer a question the answer to which involved a forfeiture of estate. That forfeiture did extend to forfeiture of this kind appears by reference to *Dumfries's Case* (1 Sm. L. C. 25), one of the earliest on the subject. There is a distinction recognised by Courts of Equity between cases of conditional limitation and a forfeiture; it is a fine distinction, but the exception recognises the principle, and the principle is the more applicable to this case, which is clearly one of forfeiture. We must be guided by the principles of the Court of Chancery: it is a principle recognised by a great authority—Lord Wensleydale; and we cannot disregard it, and ought not to force a party to answer a question involving a forfeiture.

MELLOR, J.—I am of the same opinion. It has been clearly shown by what the Lord Chief Justice and my Brother Crompton have stated, that we are not to be fettered by the precise practice of the Court of Chancery; but on the other hand, in the case where certain powers similar to theirs have been transferred to us, a doctrine of a rule of evidence is involved, and we should be going far in its application to disregard the practice of the Courts of Chancery, and to exercise our discretion in an arbitrary way. We are to be guided in this matter by the principles of Courts of Equity, and cannot allow these interrogatories to be delivered.

Rule discharged.

Q. B.) FISHER, Appellant, v. HOWARD,
 26 Nov. 1864. } Respondent.

2 & 3 Vict. c. 47, s. 42—*Licensed Ale-house—
 Traveller—Refreshment—Sunday.*

Several persons having taken their tickets at 12:30 p.m., at a railway station within the metropolitan police district, for a train by which at 12:50 p.m., they afterwards proceeded to a place nine miles distant, were served in the interval with fermented liquors at the refreshment-rooms inside the railway station, which were opened at 12:40 p.m. :—

Held, that they were travellers within the meaning of section 42 of 2 & 3 Vict. c. 47.

The appellant, Fisher, was summoned at the Westminster Police Court to answer an information, for that he being licensed to keep the ale-house known as the refreshment-rooms at the Victoria Station of the London, Brighton, and South-Coast Railway, within the

Metropolitan Police District, did, on Sunday the 18th of September, 1864, unlawfully open his said house for the sale of wine, spirits, beer, &c., before the hour of one in the afternoon, the same not being then and there for the refreshment of travellers, contrary to 2 & 3 Vict. c. 47, s. 42.

The magistrate convicted the appellant, but granted a case, the material facts of which were as follows :—

The appellant was, on the day mentioned in the information, a licensed victualler, carrying on business at the refreshment-rooms as aforesaid.

On Sunday the 18th day of September, a train left the Victoria Station at ten minutes before one o'clock in the afternoon for Croydon, nine miles distant, calling at six intermediate stations. The public were admitted to the Victoria Station, and the office was opened for the delivery of tickets at half-past twelve o'clock in the afternoon. At twenty minutes before one o'clock in the afternoon the said refreshment-rooms (which are within the said station) were opened by the said appellant, and twenty-five persons then entered the said refreshment-rooms and were served with fermented liquors. These twenty-five persons had taken tickets for, and proceeded afterwards by, the said train.

No evidence was given to show whence any of these persons had come before they entered the railway station, nor whether they, or any of them, were resident in the metropolis.

The 10th section of the "Public-house Closing Act, 1864," 27 & 28 Vict. c. 64, was referred to in support of the appellant's argument.

The magistrate was of opinion that, upon the evidence before him, there was nothing to show that any of the said persons were travellers before they had started on their journey by the train. That if they were travellers, as contended, before they commenced their journey by railway, they would have been entitled to call at any public-house in any street on their way to the railway station and demand refreshment as travellers, and that the 10th section of the Public-house Closing Act, 1864, had no bearing on the case.

The question submitted for the consideration of the Court, was, whether a person entering a railway station, with the intention of starting by a train therefrom, becomes thereby a traveller within the meaning of the 2 & 3 Vict. c. 47, s. 42?

That section enacts : "That no licensed victualler or other person shall open his house within the Metropolitan district, for the sale of wine, spirits, beer, or other fermented or distilled liquors, on *Sundays, Christmas-Day, and Good-Friday*, before the hour of one in the afternoon, except refreshment for travellers."

Section 10 of the Public-house Closing Act, 1864 (27 & 28 Vict. c. 64), enacts, that "nothing herein contained shall apply to the sale at a railway station, between the hours of one and four o'clock in the

morning, of exciseable liquors or refreshments to persons arriving at or departing from such station by railroad."

Atkinson v. Sellers, 28 L. J. M. C. 12;

Taylor v. Humphreys, 30 L. J. M. C. 242; and again in C. P. 18 Nov. 1864,

were not referred to in the argument.

C. Pollock, for the respondent.

The magistrate was right. It is quite immaterial whether the refreshment be within or without the railway station. If a man is a traveller as soon as he leaves his house, he will be entitled to knock up any innkeeper on his way to a railway station.

[CROMPTON, J.—Do you say he would not be a traveller if he had come up from Croydon on this occasion?]

He would not if his house was close at hand. The test is, whether his home is near.

[CROMPTON, J.—Is a man not a traveller who has started on his journey and taken his ticket, simply because he prefers having refreshment before the train starts, to having it at an intermediate station? Is a man who has taken his ticket and got into the carriage, not a passenger, simply because the train has not yet moved? The common sense of all mankind will say that these persons here were clearly travellers.]

[MELLOR, J.—The object of the statute was to prevent persons sitting and drinking in public-houses during those hours. It would be an abuse of the statute to say that a man who has taken his ticket, as in this case, is not a traveller within the meaning of the section.]

Section 10 of the Public-house Closing Act, 1864, contains a special exemption in favour of railway refreshment-rooms; and there being no such exemption in the 2 & 3 Vict. c. 47, it is clear that this statute makes no difference between railway and other refreshment places. The taking a ticket does not make a person a traveller, but only shows his intention to become one.

Sleigh, Poland, and H. T. Jenkins, for the appellant, were not called on.

CROMPTON, J.—Our judgment is for the appellant. The word "traveller" is not a technical term, and it is quite clear that these persons were "travellers" in the common-sense use of the word.

MELLOR, J.—I am of the same opinion. It must be understood that our judgment is based on the special facts of this case.

SHEE, J., concurred.

Judgment for the appellant.

Q. B. } **WHITELEY, Appellant, v. ARMITAGE and Others.**
26 Nov. 1864. }

**4 Geo. 4, c. 34, s. 3—Master and Servant—
Penalty for absence from Service.**

W worked as a stuff-presser and stuff-finisher, exclusively for certain employers, superintending a gang of their workmen, but worked also with his own hands, and received weekly from the employers the whole of the wages earned by the gang by piecework, and after deducting a certain per-centage for himself, divided the rest equally among the workmen and himself:—

Held, that W was liable to be convicted for absenting himself from his service before the completion of his contract, under section 3 of 4 Geo. 4, c. 34.

At a Petty Sessions at Bradford in the county of York, an information was laid against the appellant Whiteley, by the respondents, for an offence under 4 Geo. 4, c. 34, s. 3.

It was proved in evidence that before the 4th of March, Whiteley worked for the respondents as a stuff-finisher and stuff-presser of Italian goods. He worked at this with his own hands as well as directed others, the respondents superintending the work. About twenty men did the work. Whiteley engaged them, subject to the approval of the respondents, and could discharge them with the respondents' permission. His wages were paid weekly by the piece, in the following manner: Whiteley received every week the wages earned for the work done by himself and all the men under him, took five per cent. for himself, and then divided the remainder among the men under him, he taking an equal share of the remainder himself. Whiteley was entirely the servant of the respondents, working exclusively for them. If goods were injured, the respondents sustained the loss, except in the case of Whiteley's gross negligence. The respondents provided all the tools for pressing, both for Whiteley and all the men under him.

On the 4th of March, Whiteley contracted verbally with the respondents to serve them for twelve months on the old terms, and immediately went to his work, and continued at it till the 24th of March, when he left, and did not come back. On the 18th of March, he sent the respondents a written notice that he should leave them that day week, which the respondents refused to accept. They paid him his wages every Saturday after the 4th of March, just as before. On these facts, the magistrates were of opinion that he had committed an offence under section 3 of 4 Geo. 4, c. 34, and sentenced him to the House of Correction for one month with hard labour. On the application of the appellant the Justices stated a case for the opinion of the Court, the questions being—

1st. Whether the appellant was an artificer, la-

bourer, or other person within the meaning of 4 Geo. 4, c. 34, s. 3.

2nd. Whether the contract was binding, and if so, the contract not being in writing, was there a sufficient entry into the respondent's service?

Section 3 of 4 Geo. 4, c. 34, enacts, "That if any servant in husbandry, or any artificer, calico printer, handicraftsman, &c., labourer, or other person, shall contract with any person or persons whomsoever to serve him, her, or them, for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same," any Justice may commit, &c.

No counsel appeared for the appellant.

Moule for the respondents.

This man laboured with his own hands, and was exclusively the servant of the respondents, and therefore was rightly convicted,

Lawrence v. Todd, 32 L. J. M. C. 238;

Ex parte Gordon, 25 L. J. M. C. 12.

CROMPTON, J.—I think the conviction was right, since this man worked with his own hands.

MELLOR, J.—I concur. There was certainly an entry on the 4th of March to satisfy the statute.

SHEE, J., concurred.

Conviction affirmed.

Q. B. } **WATSON, Appellant, v.**
26 Nov. 1864. } **MARTIN, Respondent.**

Coram—CROMPTON, MELLOR, and SHEE, JJ.

**5 Geo. 4, c. 83, s. 4—Instruments of Gaming—
Current Coin of the Realm.**

Persons tossing halfpence in the public highway, and betting and exchanging money upon the result of "heads" or "tails," are not liable to be convicted under the 3rd section of 5 Geo. 4, c. 83, since halfpence are not "instruments of gaming" within the meaning of that section.

At a Petty Sessions, at Dewsbury, the appellant Watson was summoned before two Justices for the West Riding of Yorkshire, to answer a complaint, "For that he, at Gomersal, in the West Riding of the county of York, did, on a certain day, unlawfully play in a certain highway there situate, with certain instruments of gaming called halfpence, at a certain game of chance called toss, contrary," &c. The complaint was laid under the 5 Geo. 4, c. 83.

It was proved that, on the day in question, Watson, and a number of other persons, were seen upon the highway at Gomersal, by two police constables. Watson was tossing up halfpence of the ordinary current coin of the realm, and he and the other persons were betting upon the number of "heads" or "tails." The halfpence came down, and money passed between him and others on the result of such tossing.

The magistrates convicted Watson, and sentenced him to the House of Correction for seven days, but stated a case for the opinion of this Court, containing the above facts. If the Court should be of opinion that halfpence used in the manner stated above were instruments of gaming, within the meaning of the Vagrant Act, the conviction was to be confirmed, and if not then the conviction was to be quashed.

Section 4 of the Vagrant Act, 5 Geo. 4, c. 83, enacts, "That every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of this Act," and that any Justice may commit, &c.

No counsel appeared for the respondent.

Quain, for the appellant. Halfpence are not instruments of gaming within the Act.

[CROMPTON, J.—Are peas and thimbles?]

PER CURIAM.—We cannot strain the Act so far as to include halfpence.

Conviction quashed.

Q. B. } THOMAS, Appellant, v.
29 Nov. 1864. } JONES, Respondent.

*Salmon Fishing—Fixed Engine—24 & 25 Vict.
c. 109, s. 11.*

A net which extends from one bank nearly to the middle of a tidal river, which is attached at one end to a stone on the bank sufficiently heavy to keep the net quite firm, and is kept up at the other end by corks with lead to keep it down in the river, in such a manner that when a salmon touches the net, the stone gives way and the net gathers round and entangles the salmon, is not a "fixed engine" within the meaning of section 11 of 24 & 25 Vict. c. 109.

This was a case stated by Justices for the opinion of this Court under 20 & 21 Vict. c. 43, containing facts of which the material parts are as follows:—

At a Petty Sessions, held at Cardigan for the county, an information was preferred by the respondent Jones against the appellant Thomas, for an offence against section 11 of 24 & 25 Vict. c. 109, for using "certain fixed engines, to wit, certain nets temporarily fixed to the soil for the purpose of catching salmon in a part of the tidal waters of the river Tivy (such part comprising about three miles of the said river)."

It was proved that Thomas was seen setting three nets for catching salmon on one side of the Tivy, which were placed about twelve yards apart, and extended to near the centre of the river. Each of the nets was attached at one end to a stone which was on the bank of the river, and which weighed from six to twelve pounds, and kept the net quite firm. At the other end the net was kept up by corks with lead to keep it down in the river. The river was three or four feet in depth, and it was doubtful whether the net would reach the bottom. The net was six yards in length, and one yard sixteen inches in depth. The nets do not remain the same length in the water, they contract very much. They are always placed in quiet water and not in a current. When a salmon touches the net, the stone gives way, and the net moves, and gathers together, and the salmon gets entangled and dies, and (in the words of one witness) "the salmon is rolled up like a rabbit in a net. I do not know whether such a net would catch salmon without a stone. It requires a weight to hold the net and keep it extended." The effect of nets thus set would be to catch and scare salmon. This part of the Tivy was tidal and navigable. The magistrates being of opinion that the nets in question were fixed engines within section 11 of 24 & 25 Vict. c. 109, convicted Thomas, and fined him 1s.

The question for this Court was, whether or not the conviction was right. And the Court was requested to remit the case to the Justices with their opinion thereon.

Section 11 of the Salmon Fishery Act, 1861, enacts, that "no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine; provided always that nothing in this section contained shall be deemed to apply to fishing weirs or fishing mill-dams."

Section 4 enacts, that the words "'fixed engine' shall include stake-nets, bag-nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish."

Keane, Q. C., and J. W. Bowen, for the appellant.

This is not a fixed engine, for it moved and left a clear passage as soon as one fish came into it, or if any one on the bank accidentally knocked the stone off.

Hardinge Giffard for the respondent.

This is a fixed engine, for it is a machine which works day and night when men are asleep. If human labour is employed, the fish have a chance of escape, for men tire, but machines never. This distinction is drawn in 2 Henry 6, c. 16.

[CROMPTON, J.—But when one fish is taken the net is gone for that time.]

Yes, but there were three here; and a man might

have relays of them all the way up a river. This would clearly be within the mischief of the statute.

[CROMPTON, J.—There is nothing in the Act to show that you may not use two moveable engines so as to have the same effect as one fixed engine.]

The statute is passed to prevent that effect. This is "a net temporarily fixed to the soil," and therefore "a fixed engine."

[MELLOR, J.—If the case made it appear that the intention and effect were continuously to block up the river, then the conviction might be right.]

CROMPTON, J.—We think the magistrates were wrong. This stone is not an anchor fixed into the ground, and it is impossible to say that a net moored at one end to a bank by a moveable stone, which is cleared away when the first fish comes, is a "fixed engine" within the meaning of the statute.

MELLOR and SHEE, JJ., concurred.

Conviction reversed.

C. P. } TAYLOR v. HUMFRIES.
9, 11, 18 Nov. 1864. }

Opening Public-House before 12.30 on Sunday
—11 & 12 Vict. c. 49, s. 1—*Traveller.*

A person who comes abroad on a Sunday, either for business or pleasure, and by reason thereof needs refreshment, is a traveller within 11 & 12 Vict. c. 49, s. 1: but if he comes abroad merely to obtain drink, he is not.

It is for the informer to prove that the prohibition contained in the above section has been infringed, and that the case is not within the exception.

Whether the publican believed that his guest, either when he admitted or when he supplied him, was such a traveller, is for the Justices to decide, on consideration of the circumstances under which he was admitted and supplied.

The appellant, a licensed victualler at Moseley, in Worcestershire, was summoned before Justices in Petty Sessions, under 11 & 12 Vict. c. 49, s. 1, for opening his house on Sunday, the 17th of April, 1864, before 12.30 in the forenoon, other than for the refreshment of travellers; and the Justices convicted him, subject to the opinion of the Court on the following case:—

It was proved by the evidence of Thomas Place, a police-constable, that at twenty minutes past eleven in the forenoon of the day mentioned in the information, he went to the defendant's house, and finding the door closed, but unfastened, opened it and walked in, and found thirty-two men and women were in the house, of whom some were seated in the tap-room, others standing in the passage leading from the front-door, and in which the bar-window is situated; some were drink-

ing or had ale before them, and some of the men were smoking. The defendant's daughter was engaged in drawing beer for the company. The defendant told Place that the company were all strangers, upon which Place replied, "I suppose you call them travellers?" He said, "Yes, they are travellers." Several got up and said they came from Birmingham. They were strangers to witness, and had the appearance of Birmingham artisans; and it was assumed or admitted that they came from Birmingham. Their conduct was orderly. The defendant's house is situated a little more than two and a half miles from the centre of the town, and the borough extends to within about one and a half mile, and is built upon up to the boundary, from which rows of houses or detached villas stretch to the village of Moseley. Two of the customers on the occasion were called as witnesses, and proved that they were inhabitants of Birmingham, and had walked from the town through lanes and fields that morning, thereby extending their walk—the one to seven, the other to eight miles, before reaching the defendant's house, where they had ale and bread and cheese on their way home. They stated that they did not leave home with the intention of calling at defendant's house. It was also proved by them that they were asked if they were travellers before being supplied, and that they replied that they were. These witnesses were at that time within about two miles of their residences; and the few whose addresses were ascertained appeared to be inhabitants of that part of Birmingham nearest to Moseley, and within a mile and a half or two miles of it: of course, some might have come a greater distance.

For the defendant it was contended, first, that there was not sufficient evidence of opening, as no distinct opening had been proved. The Justices were of opinion that the fact of persons being in the house, especially in the entrance passage and at the bar, although the policeman had not actually seen the door opened, was sufficient to enable them to draw an inference that the house had been opened; and considering also that the witnesses for the defence, who proved admission, had been obtained without difficulty, were of opinion that the evidence was sufficient on this point.

It was then contended that the company were travellers; that they lived in another parish, and that on their representing themselves to be travellers, the landlord was bound to supply them. On the whole case the Justices were of opinion that, for all that appeared to the contrary, the company assembled had come from Birmingham, many of them a distance of less than two miles; that although the fact of a man being a traveller was not actually a question of distance, he must be on a journey or a wayfarer; that, firstly, in the case of such as they assumed had only come from the near end of Birmingham, proceeding on foot a distance of less than two miles did not con-

stitute a journey; and next, as to the others, who were shown to have taken a longer walk, and to be at so short a distance from their homes, that they had ceased to be travellers in the same degree as if the same individuals had arrived in Birmingham, and had applied for refreshment at a tavern in the same street as their own residences. They were of opinion that the fact of the public-house not being in the same parish as the residence of the customer, was unimportant; that under the circumstances the persons were not travellers, and that the inquiry made at the entrance of the customers could not be considered *bona fide*, and they fined the defendant the sum of forty shillings and costs.

Hayes, Serj., for the appellant.

(His argument sufficiently appears in the judgment.)

Keane, Q. C., for the respondent.

The guests were not travellers, and the burden of proving that they were so is cast on the appellant, the person informed against,

Tennant v. Cumberland, 23 J. of P. 51.

That case is not reported elsewhere. To make persons travellers within the meaning of the Act, there must be toll consequent on the travelling, so that the person requires refreshment, and that constitutes the difference between refreshment and luxury. Parochiality has nothing to do with the question.

Hayes, Serjt., in reply.

The following cases were also cited :

R. v. Ivens, 7 C. & P. 213;

Atkinson v. Sellers, 5 C. B. (N. S.) 442; 28 L. J.

M. C. 12;

Taylor v. Humfries, 10 C. B. (N. S.) 429; 30 L. J. M. C. 242.

18 Nov. 1864.

ERLE, C.J., now delivered the following judgment of the Court :—

In this case the question is, whether the evidence supported the information, and the answer depends mainly on the meaning of the word "traveller" in the statute. It has been contended for the appellant, that, as the persons admitted into his house were artisans of Birmingham walking out in the country on Sunday morning, and needing refreshment by reason of the walk, that therefore they were travellers taking refreshment within the words of the Act; that the inhabitants of Birmingham and other similar towns may well desire to emerge from a crowded region, covered with brick and smoke, and are legally and morally right in gratifying that desire, by taking a walk into the country during the hours best suited for a sight of the sun; in other words, on the only day on which artisans are free—on Sunday morning: that the prohibition against supplying any fermented liquors, and indeed any sustenance whatever, on Sunday till half-past twelve, imposed on all throughout

Great Britain, who have any licence whatever to sell cider, or beer, or wine, or spirits, attaches on a very large part of the class that gain their livelihood by supplying food to the stranger and the homeless; and that the wants of the persons maintaining themselves in the area between the Land's End and the North of Scotland are very various, considering the variety of habits incidental to living in town and country, on sea and land, on mountain and marsh, north and south, on the surface and in mines, and the like; and as the extensive prohibition is subject to an exception, the exception was probably intended to be capable of extensive application in proportion to the prohibition: that the intention of the Legislature in the prohibition was to promote the better observance of the Lord's-Day in general, and in particular, by excluding those who yield too much to the attraction of the public-house from their accustomed haunts, to bring them to places of worship, and so to the paths of piety and virtue: that the intention of the Legislature might also in part be promoted by permitting resort to the beauties of nature at proper seasons, and allowing wholesome refreshment needful for the comfortable enjoyment thereof; and that the same intention would probably be in part defeated by confinement in noisome air, and deprivation of wholesome sustenance when needed; that therefore the word "traveller" ought to be construed to include all who fare abroad, either from a desire to enjoy country sights and sounds, or from any other motive of business or pleasure, except the desire for excessive drinking; and that any supply of refreshment needed by reason of such faring abroad, ought to be construed to be refreshment to a traveller. It was further contended that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burden of proving that the prohibition has been infringed, and that the case is not within the exception, is cast on the informer, *Gill v. Scrivens* (7 T. R. 27); *R. v. Pratten* (6 T. R. 559); and that, if the publican believed, or had reason to believe, when he supplied the drink, that he was supplying refreshment to a traveller, he ought not to be convicted. We think that this argument of my Brother Hayes for the appellant is well founded, and that the statute ought to be construed on the principles that he has contended for. We think that a person would be a traveller within the exception if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment: but if he came abroad merely because he desired to go to a public-house and obtain drink, he would not. The circumstances under which the guest was admitted and supplied would be matter for consideration in deciding whether the publican had reason to believe, and did believe, that he was a traveller within the description, either when he admitted him, or when he afterwards supplied him; such as whether he was a stranger or a neighbour, whether he delayed longer or took

more than was consistent with the need of refreshment. The distance also would be relevant; but no rule can be laid down for a defined distance, as that which may be short for the vigorous may be long for the weakly.

The cases decided on the matter support the appellant's argument. In *Atkinson v. Sellers* (5 C. B. (N. S.) 442), the magistrates convicted because the guests had taken a drive of a few miles for pleasure on a Sunday afternoon, being of opinion that business was necessarily included in the idea of travelling, but the Court quashed the conviction. Cockburn, C.J., says, a man cannot be said to be a traveller who goes to a place merely for the purpose of taking refreshment, but if he goes to an inn for refreshment in the course of a journey, whether of business or pleasure, he is entitled to demand it, and the innkeeper is justified in supplying him; and Crowder, J., says, the only real distinction is between a man living in the neighbourhood, or at a distance: whether he is travelling for pleasure or on business cannot make any difference. In *Taylor v. Humphries* (10 C. B. (N. S.) 429), the magistrates convicted where the guests had walked out on Sunday afternoon about four miles for their pleasure; but this Court quashed the conviction, on the ground that a man might be a traveller though he only walked for pleasure, and had not exceeded the distance above-named, and adopted the reasons given by the Chief Justice in the last-mentioned case.

The context of the statute supports the appellant's argument. Section 1 prohibits every licensed victualler, and every beerhouse-keeper, in Great Britain, from opening their houses for the sale of, and from selling, any fermented or distilled liquors on Sunday before 12.30, except as refreshment for travellers. Section 3 prohibits every licensed victualler, and beerhouse-keeper, and every person licensed or authorised to sell any fermented or distilled liquor, and every person claiming to sell wine by retail by reason of being free of the Vintners' Company, or any other right or privilege, from opening a house for sale of any article whatsoever during the prohibited hours, except as refreshment for travellers. Section 4 prohibits every person from opening any house or place of public resort for the sale of fermented or distilled liquors, or from selling such liquors during the prohibited hours, except as refreshment for travellers. Section 5 empowers constables to enter any house or place of public resort for sale of such liquors at any time. Section 6 makes every person offending against the statute liable to a penalty not exceeding 5*l.* for each offence, and declares that every separate sale shall be a distinct offence.

These provisions are very stringent: for example this appellant might have been fined 160*l.*, that is 5*l.* for each guest: they do not bear upon the rich, who have refreshment at their command, but they coerce the poorer classes throughout the island—salutary

when they check the disorderly, pernicious when they molest the discreet; and we consider that by construing the exception in a wide sense we save from vexatious restriction many who have a right to be trusted with self-control, and at the same time leave the prohibition in force as far as the interests of real piety are concerned. The result is that the case should be sent back. We place great reliance on the local knowledge of the magistrates: they can tell whether the appellant believed with reason that his guests were travellers taking refreshment according to the description above given, or were making a pretence to that character for the purpose of profaning the Sunday and passing it in drinking. Perhaps it would not be worth while to proceed further against the appellant under the present facts, because, unless he raises the question again by his future conduct, the information will not have been without effect. If he does raise the question again, then the principles here explained may probably guide to a decision in accordance with our view of the law.

C. P. } ROBERTS, Appellant, v.
19 Nov. 1864. } PERCIVAL, Respondent.

REGISTRATION APPEAL.

County Qualification — Bedesman — Equitable Freehold for Life — Charitable Donation, 2 Will. 4, c. 45, s. 36, Decision of the Court of Common Pleas to be final—6 & 7 Vic. s. 66.

In Lord Burghley's Hospital, the Warden and Bedesmen respectively occupy separate rooms for life, no Bedesman has ever been removed, but a power of donation exists by the ordinances. The Warden and Bedesmen jointly manage the remainder of the property. The ordinances mention certain feoffees and their heirs, but none were ever known to exist.

Held, that the property is held by the Warden and Bedesmen as joint tenants, except as to their rooms, in which they respectively have an equitable freehold life estate.

This was a consolidated appeal from the Court of the revising barrister for the county of Northampton who stated the following case for the opinion of the Court. Thomas Waddington objected to the vote of Abraham Bell; the name and description of the voter in the registry was as follows:—

| | | | |
|----------------|---|----------------------------|--------------------|
| Bell, Abraham. | Lord Burghley's Hospital, St. Martins Stamford Baron. | Freehold Tenement or Room. | A. Bell, occupier. |
|----------------|---|----------------------------|--------------------|

The facts as to the appointment of the several claimants, and the nature and mode of enjoyment, and the qualifying property are similar to the facts as stated in the case of *Simpson v. Wilkinson*, 7 M. & G.

50, and the facts of that case are admitted, and are to be taken *mutatis mutandis*, as if stated as part of this case, as is also the copy of the ordinances printed in such report. Upon the objections being called on, it was contended on the behalf of the respondent that the barrister had no power to enter on the inquiry according to 6 Vict. c. 18, s. 66, the judgment of the Court having been given upon facts similar to those which are the foundation of the present claim: the whole of the claimants in the present case have been appointed since the above judgment was delivered: he decided to go into the case, and to hear the evidence, being of opinion that the words, "the case," in the said section, referred only to the current register; or, at any rate, to the particular individuals affected. If the Court shall be of opinion that this contention should have prevailed, the names are to be retained without reference to the remainder of this case.

The 21st ordinance orders that the bedesmen shall have at the first their several rooms allotted them in the almshouses, so shall they, during their lives on their continuance in their places, continue their lodging; and every one, as he shall succeed to the said places, so shall he succeed in the lodgings without any change.

The following additional facts were then proved: That in the year 1846 part of the hospital premises not separately used by the then occupiers, were sold to the Midland Railway Company for the purpose of a railway. That the sale was conducted by the then warden and bedesmen, as owners, without the intervention of any other person—that the warden and each of the bedesmen signed the conveyance to the company. The money was paid to the warden and bedesmen, and expended by them in erecting buildings upon part of the garden attached to the hospital, which buildings are now used as a wash-house by the warden and bedesmen, as they have occasion.

It was then contended by the objector, that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate, and that the additional facts above stated led to this conclusion, that they had no freehold estate. That if they had, it was only a joint tenancy, in the whole hospital, and not an exclusive and separate one in each of the rooms, and that this also appeared from the new facts. That they were in receipt of alms, and that, looking at the recent decisions, and especially

Freeman v. Gainsford, 11 C. B. (N. S.) 68; the claims were bad.

The barrister overruled these objections, and retained the several names on the list of voters, being of opinion the facts were the same, and that there was therefore nothing to disentitle the claimants to the benefit of the judgment of the Court on the same foundation, whatever were the reasons of such deci-

sion, and that they did not receive alms within the meaning of 2 Will. 4, c. 45, s. 36.

Hannen and Underdown, for the appellant.

This is really an appeal from *Simpson v. Wilkinson*. We are not precluded by the above case from reopening the question; if we are, or not, depends on the construction of 6 Vict. c. 18, s. 66, which decides that the decision of the Court is to be final; this only means that it is conclusive in the individual case. If you decide against us on this point, it is unnecessary to proceed.

[ERLE, C.J.—Proceed.]

The second question is, whether or not the claimant has an equitable freehold interest for life,

Simpson v. Wilkinson, 1 Lut. 177;

Freeman v. Gainsford, 11 C. B. (N. S.) 68;

Heartley v. Banks, 5 C. B. (N. S.) 40;

and contended that the facts were similar in the three cases; that he was in receipt of alms, within the meaning of the 36th section of 2 Will. 4, c. 45, and therefore disqualified from voting.

Field, Q.C., for the respondent.

ERLE, C.J.—I am of opinion that the revising barrister was right in this case. It was decided in *Simpson v. Wilkinson* that a legal foundation for the hospital might be assumed, not necessarily investing the bedesmen with a corporate character; and that the bedesmen were entitled to a separate equitable estate of freehold in their rooms: we are of the same opinion.

The origin of the hospital is unknown: one has a right to presume that it had a legal origin, and that it was founded under a feoffment, feoffees being mentioned in the rules. By the 35 Eliz. c. 7, s. 27, it was enacted, that persons might make feoffments to the use of the poor. Prior to the 39 Eliz. c. 5, no hospital could be incorporated but by the Crown, or under licence from the Crown by letters patent. There is no evidence to show that this hospital was ever incorporated. There is nothing, therefore, to disqualify the bedesmen from their being members of a corporation aggregate. As we have no direct evidence to show whether the lands were conveyed for the benefit of the inmates of the hospital by way of simple or special trust, we must look to the way the lands are employed to ascertain that fact.

It appears by the 21st ordinance that the inmates have a life interest in their rooms; that the rest of the property is managed by all the members jointly; that they manage it as the legal owners, letting as a granary the upper story over their rooms, and dividing the rent amongst themselves equally. That part of the hospital premises not separately used they sell to a railway company, and expend the proceeds in erecting buildings for their common benefit. It appears, therefore, that each bedesman has a separate property

in his own room, and that the rest of the property is jointly vested in them. And although the ordinances mention, that if the bedesmen misbehave themselves they shall be turned out, if the attempt were made, there would be great difficulty in doing so.

The distinction between this case and *Freeman v. Gainsford* and *Heartley v. Banks* is, that the Military Knights of Windsor, and the inmates of the Earl of Shrewsbury's Hospital, that in the two latter there is a governing body in whom the estates vested, who have active trusts to perform. The Military Knights of Windsor receive a share of the profits of certain lands, and do not occupy the same room for life. In Lord Burleigh's Hospital, the bedesmen remain in the same room for life, the legal estate is vested in trustees, the equitable estate in the warden and bedesmen. If the warden and bedesmen have either a legal or equitable freehold in their rooms, it matters not at all that the gift was of charitable nature. The motives of the grantor in making the gift are immaterial and irrelevant. The question in these cases is, have the claimants either a legal or equitable estate, or have the trustees to give the profits in bounty among them? There is nothing in the Reform Act which says that an estate given to a person from charitable motives, disqualifies him from voting in respect of it.

KEATING, J.—I am of the same opinion. Mr. Hannen considered, that since the decisions in *Simpson v. Wilkinson*, in *Heartley v. Banks*, and *Freeman v. Gainsford*, the Court have laid down principles which will induce them to come to a different conclusion. Mr. Hannen has failed in showing that the circumstances are identical. There is an important distinction between those cases and this, for there is an active trust to be performed, here, there is no person acting in such a trust. The bedesmen manage the whole of the property jointly, except their rooms, in which they have an equitable life estate.

Judgment for respondent.

C. P. } METCALFE v. WESTAWAY.
21 Nov. 1864. }

Coram—ERLE, C.J.; BYLES and KEATING, JJ.

*Trespass to Land—Licence by Third Parties—
Demise with Reservation—Free Access—
"Assigns."*

Plea to action of trespass to a shipyard, setting up an agreement by which the G. E. R. Co. granted the shipyard to plaintiff for a term "except a patent slip and the site thereof, and the dues and payments payable for the use thereof, and except and reserved to the said company, their successors and assigns, officers, servants, and workmen, free access to and from the said slip for using, working, or repairing the same or otherwise," and averring that the company granted licence

to the defendant to work and use the slip, and that the alleged trespasses were an exercise of the right so reserved:—

Held, a good plea.

Declaration for trespass to a shipyard and land o the plaintiff.

Plea, setting out an agreement between the Great Eastern Railway Company and the plaintiff, by which the said company granted certain land (being the shipyard and land in question) to the plaintiff for a term of years, "except and always reserved out of that demise a patent slip therein described, and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen free access at all times to and from the said slip for the purpose of using and working or repairing the same or otherwise," &c. Averment, that the Great Eastern Railway Company granted licence and permission to the defendant to work and use the said slip, and that the alleged trespasses were a use and exercise by him of the said right and power so excepted, reserved, and given by the said deed.

Demurrer to this plea, and joinder in demurrer.

D. D. Keane, Q.C. (*Douglas Brown* with him), for the plaintiff in support of the demurrer.

The reservation does not extend to give free access to a mere licensee. It must be construed strictly. Defendant cannot say he is successor, assign, officer, servant, or workman to the Great Eastern Railway Company. You cannot give every one, whether he has an estate or not, a right to go on land,

Com. Dig. Tit. "Common."

[ERLE, C.J.—Has not the defendant got the slip?]

No. If he had, he could exclude the company, and only use it himself. But, as it is, the company can license any number of people besides him.

[BYLES, J.—Was the plaintiff interested in the slip?]

No. It was excepted.

A licensee differs from an assign in the right which he acquires.

[BYLES, J.—Does it appear on the record, that the company have parted with any of this land?]

No. That is what I complain of. The whole estate remains in them, so the defendant cannot be an assign.

A mere license without a grant is nothing. If we had interfered with his licence he would have had no action against us.

Licence is no answer to us, though it would be to the Great Eastern Railway Company. He cited,

Wood v. Leadbitter, 13 M. & W. 838;

Armory v. Delamirie, 1 Sm. L. C. (5th ed. 301 n.;

Whaley v. Laing, 26 L. J. Ex. 327.

Bovill, Q.C. (O'Malley, Q.C., with him), for the defendant, in support of the plea.

Licence is a defence to a trespass, though it may not be sufficient to maintain an action. As to the deed, if nothing more had been said than "except the slip," there would have been a way of necessity given to the company, and to every person whom it might be necessary to bring there for the use of the slip. The words added are in extension, and not in restriction, of the power thus given.

The exception of "dues for the use of" the slip show it was to be used by other persons besides the company. Plaintiff himself, if he wants to use the slip, must get leave from the company and pay dues to them.

A thing granted carries with it all means to attain it, and all fruits and effects of it,

1 Shp. Touch. 89, note o (8th ed.).

[KEATING, J.—But the other side contend that by express words here the right is limited.]

See

Dand v. Kingscote, 6 M. & W. 197, 198, per Parke, B.

[BYLES, J.—Is not the question here what is meant by "assigns" ?]

Independently of that word, the mere exception of the slip carries with it all that is necessary to enable the lessors to use the slip and to get the dues,

He also cited

Liford's Case, 11 Rep. 52;

1 Wms. Saund. 323 n. a.

Lastly, the plea expressly alleges that the defendant acted according to the terms of the reservation in the deed.

D. D. Keane, in reply, cited,

The Durham and Sunderland Railway Company v. Walker, 2 Q. B. 940;

Rez v. Inhabitants of Melior, 2 East, 189;

Rez v. Inhabitants of Tardebigg, 1 East, 527

ERLE, C.J.—Our judgment must be for the defendant. The case turns on the meaning of an exception in a demise. [His Lordship read the excepting clause.] I think the slip was kept by the company in fee simple, and that the owners can make use of it and benefit from it as they like. I think we give effect to the intention of the deed by so holding. The additional words, so far from restricting the right, extended it to others. The company might pass an interest to whomsoever they chose, for the purpose of earning dues, or otherwise.

BYLES, J.—I am of the same opinion, and should have been so if the word "assigns" had been absent from the deed. The manifest intention of the deed was, that the company should continue to make dues and profits from others for the use of the slip. The word "assigns" makes no difference. It must be taken, not in its strict sense, but as clearly meaning

"persons in possession for a time for valuable consideration."

KEATING, J.—I am of the same opinion. Looking to the subject matter of the exception, we cannot give "assigns" the limited meaning of "parties taking an estate" in that which the company had reserved to themselves. It must mean "persons using the slip by their licence." Any other construction would preclude the company from enjoying the dues which they have expressly excepted.

Judgment for the defendant.

C. P. } POWELL v. GUEST,
22 Nov. 1864. }

REGISTRATION APPEAL.

Imprisonment for Misdemeanor—No Option of Fine—Break of Residence—2 Will. 4, c. 45, s. 27.

Where a man who claimed to be registered as a voter for a borough under 2 Will. 4, c. 45, s. 27, had been imprisoned away from it for a misdemeanor during five of the six months preceding the 31st of July last before registration, without the option of paying a fine:—

Held, that, as he had debarred himself by his own criminal act from the power of returning to his home, there was a break of the residence required by the Act, and he was not entitled to be registered.

This was an appeal from a decision of the revising barrister for the borough of Kidderminster. The respondent resided in the borough till the 27th of February last, when he was brought before the Justices in Petty Sessions on a charge of misdemeanor, and committed to prison for six months without the option of paying a fine, the prison being more than seven miles from the borough. The respondent, while so imprisoned, had no family resident in the borough, but he kept a servant at his house there. It was objected that his name should be expunged from the list of voters, on the ground that he had not resided for six calendar months before the 31st of July last within the borough, or seven miles thereof, so as to satisfy 2 Will. 4, c. 45, s. 27. The barrister found there was a sufficient residence within the borough, unless the imprisonment prevented the continuance of that residence, and retained the respondent's vote, subject to the opinion of the Court on this point.

Keane, Q. C., for the appellant, contended, that though actual personal residence all the time was not necessary to constitute residence within the Act, still imprisonment must, in this case, be held a break of the residence, as it was actually illegal for the respondent to be at Kidderminster at all during his term of imprisonment,

6 Vict. c. 18, s. 98.

Ex parte Jones, 2 Ad. & E. 436.

He referred to the cases upon what constitutes a break in the five years' residence, which confers irremovability under 9 & 10 Vict. c. 66, s. 1,

Regina v. Salford, 12 Q. B. 106;

Hartfield v. Rotherfield, 17 Q. B. 746; 21 L. J. M. C. 65;

Regina v. Potterhanworth, 28 L. J. M. C. 56;

Regina v. Halifax, 17 L. J. M. C. 12;

Regina v. Barnsley, 18 L. J. M. C. 170.

Karslake, Q.C. (*Hon. R. Bourke* with him), for the respondent.

Residence has a different meaning in different Acts, and in

Dewhurst v. Fielden, 7 M. & G. 182,

Maule, J., says, "I think we should not in these (registration) appeals involve ourselves with the decisions on settlement cases." In

Nias v. Davis, 4 C. B. 444,

a prisoner, in execution in Presteign gaol, was held to retain his residence in London, so that he could petition in bankruptcy there; and in

King v. Mitchell, 10 East, 511,

it was held that freemen of Norwich, who were substitutes in the militia, and quartered at Colchester, were still inhabitants of Norwich.

A temporary residence in gaol does not constitute a dwelling under the County Court Act, 9 & 10 Vict. c. 95, s. 128,

Dunston v. Paterson, 5 C. B. (N. S.) 287.

He also cited,

Peterson v. Davis, 6 C. B. 235;

Buller v. Ablewhite, 6 C. B. (N. S.) 740;

Whithorn v. Thomas, 7 M. & G. 1;

Regina v. Holbeck, 16 Q. B. 404.

ERLE, C.J. — I am of opinion that the revising barrister was wrong. Part of the qualification required by the 27th section of the Reform Act is, that the person claiming to be registered shall have resided for six calendar months next previous to the last day of July in the year of registration, in the borough, or within seven miles of it; and here the claimant was in prison for a misdemeanor for a great part of the time during which the statute required his residence as a qualification.

I will assume that he had a house, and a wife and family, in the borough, and also the *animus revertendi* as soon as his imprisonment was over. But then he was not *sui juris*, and was not at liberty to return; and this state of things was caused by his own criminal act. The doctrine is correctly laid down in Elliott's "Parliamentary Electors" (p. 204, 2nd. ed.), where he says: "absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or

has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." There the examples given of a man debarring himself of the liberty of returning are letting his house, and abandoning the intention to return: here the claimant has debarred himself of the liberty to return by being guilty of a criminal act, on account of which he has been put in prison. "Residence" has a shifting meaning, according to the shifting intention of the Legislature in the several statutes in which it occurs. Thus, in *Nias v. Davis* (*loc. cit.*), it was for the purposes of bankruptcy that it was held that a man in prison at Presteign retained his residence in London. The statute there in question was passed *alio intuitu* from the present. Again, a person imprisoned for a civil debt has not debarred himself of the liberty of returning, for he may at any time pay or settle with his creditor; and in *King v. Mitchell*, the case was consistent with the militia men having the power to return from time to time. But here there was no option of paying a penalty, and no power to return. If five months' imprisonment would not take away a man's qualification, I do not see why twenty years' imprisonment should. On these grounds I think this claimant was not qualified as a resident.

BYLES, J. — I am of the same opinion. It is not necessary or convenient to lay down any general rule, but this seems to be the fair result of the cases; that it is a legal inability to reside caused by a man's own act, and not by his misfortune, that will break the residence. On this ground I distinguish the cases of a lunatic, a militia man, or an innocent person remanded and imprisoned on a trumped-up charge which cannot be proved; for in none of these cases is the inability to return caused by the man's own voluntary or criminal act; and so also I distinguish imprisonment on a *ca. sa.*, or for non-payment of a fine, in both which cases a man may regain his liberty by payment.

KEATING, J. — I am of the same opinion. The man who, by his own criminal act, debars himself from actually residing, does not constructively reside.

Judgment for the appellant.

C. P. } HEELIS, Appellant, v. BLAIN,
23 Nov. 1864. } Respondent.

REGISTRATION APPEAL.

Registration of Voters—Reform Act, 2 Will. 4, c. 45, s. 26—“Actual possession” of Rent-charge—“Possession” of cestui-que-use—Statute of Uses, 27 Hen. 8, c. 10, s. 1.

A rent-charge created in 1839 was conveyed by deed of January 29th, 1864, to A, to the use of B. No rent

accrued due after the deed till June, 1864, and none was paid to B till July, 1864 :—

Held, that by virtue of the Statute of Uses, 27 Hen. 8, c. 10, s. 1, B was in "actual possession" of the rent-charge for six calendar months previous to the 31st of July, 1864, so as to be entitled to a vote under the Reform Act, 2 Will. 4, c. 45, s. 26.

This was a case stated by the revising barrister for the southern division of Lancashire for the opinion of this Court under 6 & 7 Vict. c. 18, s. 42, to raise the question, whether the appellant was entitled to a vote under the Reform Act, 2 Will. 4, c. 45, as having been "in the actual possession of" a share of a certain rent-charge of 50% for six calendar months previous to the 31st of July, 1864. The rent-charge was originally created by deeds of lease and release dated the 9th and 10th of June, 1839.

By indenture of the 3rd of November, 1862, it was conveyed to Stephen Heelis, his heirs, and assigns, for ever.

By indenture of the 29th of January, 1864, between Stephen Heelis of the first part, John Heelis of the second part, and five sons of Stephen Heelis of the third part, the rent-charge was granted to John Heelis and his heirs, to the use of the five sons of Stephen Heelis, their heirs and assigns, for ever, as tenants in common.

Under this deed the appellant claimed as one of the five sons of Stephen Heelis. The half-year's rent due in June, 1864, was the first rent which accrued due after the deed of the 29th of January, and was paid to the *cestui-que-uses* in July.

It was objected that the appellant had not had "actual possession" of the share of the rent-charge for six calendar months previous to the 31st of July. The revising barrister allowed the objection, subject to the case above stated.

The question for the Court was, whether the appellant was entitled to a vote under 2 Will. 4, c. 45, s. 26.

Joshua Williams (of the Chancery Bar), for the appellant.

The claimant was in the actual possession of his share of the rent-charge, within 2 Will. 4, c. 45, s. 26, from the date of the execution of the deed on the 29th of January, by virtue of the Statute of Uses, 27 Hen. 8, c. 10, s. 1.

The argument before the barrister wrongly turned on the 4th and 5th sections of the Statute of Uses. It really depends on the construction of section 1 of the Statute of Uses as applied to section 26 of the 2 Will. 4, c. 45.

The words in the last mentioned section, "or in the receipt of the rents and profits thereof for his own use," are inapplicable to an incorporeal hereditament, such as this rent-charge is.

A rent-charge cannot be let, or at all events cannot be distrained for.

There can be no rents and profits of a rent; the hereditament is the rent.

The only words in section 26 applicable to this case are, "unless he shall have been in the actual possession thereof," and the Court must decide on those words only.

In

Murray v. Thorniley, 2 C. B. 217,

the rent-charge was conveyed by deed of grant at Common Law, not under the Statute of Uses. See Tindal, C.J.'s judgment, page 223, as to the distinction between seisin in law and seisin in fact. In the case of a Common Law grant of a rent-charge, the grantee has no actual possession till he receives part of the rent, or something, as a halfpenny, in the name of rent.

But by virtue of the Statute of Uses, s. 1, the appellant had not seisin in law, but actual seisin under the deed.

The 1st section of the Statute of Uses says, the *cestui-que-use* shall "stand and be seised, deemed, and adjudged in lawful seisin estate and possession." In the case of a "bargain and sale with release," the Statute of Uses has always given the bargainee a sufficient possession without actual entry to support the release. He then cited,

Lord Bacon's reading on the Stat. of Uses, 48 (Rowe's ed.);

13 Basil Montague's edition of Lord Bacon's Works, p. 342;

Com. Dig. Uses I.;

Cro. Eliz. 46;

3 Cruis. Dig. 274;

Butler's Note on Co. Lit. 315 a (note 1);

Burton's Real Prop. 1116 par.

Hayden v. Overseers of Tiverton, 1 Lut. R. C. 510, will be cited against me. But there were two instruments in that case, and the Statute of Uses had no application.

At Common Law actual seisin is contemporaneous with payment of rent. But, under the Statute of Uses, the *cestui-que-use* has actual seisin at once.

Keane, Q.C., for the respondent.

According to the contention on the other side, a man might have a vote without ever receiving a farthing of rent.

[ERLE, C.J.—We must go by the words of the Legislature. Even at Common Law, payment of a penny in the name of rent would give actual seisin.]

The Statute of Uses does not operate to give actual possession of a rent-charge.

No authority by decision has been cited on the other side.

[ERLE, C.J., referred to some remarks of Lord Eldon in the House of Lords in the case of *Smith v. Doe d. Jersey (Earl)* (2 B. & B. 599), which sanctioned the respect paid to the traditions of conveyancers.]

The use of the word "possession" differed from

that of the words "actual possession," in the time of Henry the Eighth,

Bevill's Case, 4 Rep. 10 b.

Seisin in Law differs from actual seisin.

The Statute of Uses makes no mention of the peculiar form of conveyance called "lease and release." The 4th and 5th sections contain special provisions for the conveyance of a rent-charge,

Sugd. Gilb. Uses and Trusts, 193.

Those sections give the *cestui-que-use* the seisin and possession only "as if a sufficient grant or other lawful conveyance had been made or executed to him." It is conceded, on the other side, that if this had been a grant at Common Law, the claimant would not have a vote. *Murray v. Thorniley*, and *Hayden v. Overseers of Tiverton*, decide this.

Joshua Williams, in reply.

The difference between seisin in law and actual seisin is granted. Sections 4 & 5 of the Statute of Uses discharged their duty when the rent-charge was created. They have nothing to do with the case since 1839.

[ERLE, C.J.—You say the 4th and 5th sections (or the 3rd, as it is numbered in some editions of the statutes) had only to do with the creation of the rent-charge, and nothing to do with the conveyance of the tenement and rent-charge in 1864.]

Precisely. He was then stopped.

ERLE, C.J.—I am of opinion that the revising barrister was wrong, and that the claimant is entitled to his vote. He claimed to have been in the actual possession of a share of a rent-charge for six calendar months before the 31st of July, 1864. It appears that the rent-charge in question was created by the owner in fee simple in 1839, and after mesne conveyances was conveyed by deed, in 1864, to John Heelis, to the use of the claimant and others as tenants in common. No payment had been made out of the rent-charge till July, 1864, and at Common Law, without the Statute of Uses, there would have been no actual possession, on the distinct authority of the two cases cited. But the conveyance in this case was by virtue of the Statute of Uses, 27 Hen. 8, c. 10, s. 1. The Reform Act, 2 Will. 4, c. 45, s. 26, requires that the party should be "in actual possession." The Statute of Uses says the *cestui-que-use* shall be "in possession." I am of opinion that the word "possession" has a technical meaning, which real property lawyers should have clear ideas about. I think the Legislature in the time of Henry the Eighth meant the same thing by "possession" as the Legislature at the time of the Reform Act meant by "actual possession." It is said that the mere interposition of an extra name in a conveyance ought not to operate so as to give an actual possession which an ordinary grant would not give. But the two cases quoted point out, as a means of giving actual possession, what would be a thoroughly illusory fact, such as handing over a halfpenny in the

name of rent, which ought not to have more operation than a deed under the Statute of Uses, a mode of conveyance which has been understood and used for centuries. On the construction of the statute authorities have been quoted which are entitled to very high respect. [His Lordship then referred to the authorities quoted.] I think, as I said before, that I have the authority of Lord Eldon for paying the greatest respect to the traditions of conveyances.

KEATING, J.—I am of the same opinion. I think the revising barrister was wrong, but if I had had to decide this point as he had, without the benefit of the arguments which we have heard, I should probably have decided as he did. Mr. Williams's argument has satisfactorily shown the distinction between the conveyance of a share of a rent-charge at Common Law and by the Statute of Uses. The authorities show that the appellant had, by virtue of the Statute of Uses, such a possession of the rent-charge as entitled him to a vote under the Reform Act.

Judgment for the appellant.

O. P. } BENNETH, Appellant, v.
23 Nov. 1864. } BOOTH, Respondent.

REGISTRATION APPEAL.

Coram—ERLE, C.J., and KEATING, J.

Registration of Voters—Notice of Objection—
6 & 7 Vict. c. 18, s. 100—*Evidence—Stamped*
Duplicate—"Copy."

The service of a notice of objection by post, under the 6 & 7 Vict. c. 18, s. 100, is proved by the production of a stamped document, similar in all respects to the notice left with the postmaster, save that it has the word "copy" upon it: such document being a "stamped duplicate" within the meaning of the Act.

This was a case stated by a revising barrister for the City of London.

By 6 & 7 Vict. c. 18, s. 17, a notice of objection is required to be given to any person objected to by the person objecting. And by section 100 "whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the postmaster . . . and the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped . . . and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person," &c.

In this case the objector produced a document duly stamped with the post-office stamp, and corresponding in other respects with the notice required to be given

by Schedule B of the 6 & 7 Vict. c. 18, but it had the word "copy" on it. The barrister admitted parol evidence to show that the notice actually served had not "copy" on it. The notice was held good, and the appellant's name was struck out, subject to the opinion of this Court as to the validity of the notice.

Hannen (*Underdown* with him), for the appellant.

1st. Either the word "copy" must be taken to have been on the notice actually served, which would vitiate it, as an original notice is intended.

2d. Or, if the barrister was right in admitting parol evidence which showed that the word "copy" was not on the notice actually served, then these two documents were not duplicates, and the statute has not been complied with,

Toms v. Cuming, 7 M. & G. 88; 1 Lut. R. C. 200;

Birch v. Edwards, 5 C. B. 45; 2 Lut. R. C. 37.

Favcett, for the respondent, was not called upon.

ERLE, C.J.—I think the barrister was right; and that notice of objection was duly proved. The statute requires that the notice shall be sent to the person objected to, and a duplicate original shall be kept by the objector and produced as evidence. If the word "duplicate" had been put on the document kept by the objector, it would have been strictly correct. Instead of "duplicate" the word "copy" is put, which practically means the same thing. These documents were in all essentials "duplicates."

KEATING, J.—I also think this was a good notice. *Birch v. Edwards* was a different case. There the external address was an essential part of the notice, and a material variance was established.

Judgment for the respondent.

C. P. } *CAPEL v. POWELL* and
24 Nov. 1864. } Another.

Tort of Wife during Coverture—Liability of Husband—Effect of Divorce à Vinculo.

Where a woman has been divorced from her husband à vinculo matrimonii, he cannot afterwards be sued for torts committed by her during the coverture.

Declaration "that the defendant Caroline Nicker, at and during the time that she was the wife of the defendant Ellison Powell, unlawfully gave the plaintiff into the custody of a police constable on a false charge of felony," &c.

The defendants severed in their pleading, Caroline Nicker pleading not guilty and a justification, and Ellison Powell, "that at the commencement of this action the said Caroline was not, nor is she now, his wife." New assignment for trespasses committed by the said Caroline while she was the wife of the said Ellison Powell; and plea thereto in the same words as the plea to the declaration, and issue thereon.

At the trial at Guildford before Martin, B., the defendant, Caroline Nicker, did not appear, and a verdict was found against her; but a verdict was found for the male defendant on the issue raised by him.

The facts were, that the female defendant, while still the wife of the male defendant, gave the plaintiff into custody on a charge of felony which was not substantiated; subsequently she was divorced & *vinculo matrimonii* for adultery, and then this action was brought.

Daly obtained a rule for judgment *non obstante veredicto* against the defendant Ellison Powell, on the ground that the husband's liability for the tortious act of the wife during coverture is not discharged by a decree dissolving the marriage on the ground of adultery.

Hawkins, Q.O., and *Sir George Honyman* now showed cause.

In suing for a tort by the wife during coverture, the husband is only joined for conformity, for he is not "liable" himself as a tort-feasor: and if she die before judgment the suit will abate, while if he dies, her liability continues,

1 Chitty on Pleading, 104 (7th ed.).

Here the effect of the divorce is as if the husband had died. The 20 & 21 Vict. c. 85, s. 28, does not apply to the dissolution of marriage, but to judicial separation only; and as the law then stood, the husband continued liable till the civil relation ceased,

Head v. Briscoe, 5 C. & P. 484; 2 L. J. (N. S.) C. P. 101.

Daly and *Houston* in support of the rule.

The 26th section of the Divorce Act, by absolving the husband from liability for his wife's torts after judicial separation, impliedly confirms his liability for previous acts: and so with divorce. Death is the act of God, and dissolution of marriage the act of the parties to the suit; by their own act they cannot take away a vested right of action.

[Erle, C.J., referred to

Marshall v. Rutton, 8 T.R. 554.]

ERLE, C.J.—I am of opinion that this rule should be discharged. The husband of a woman who is divorced from him is not liable to be sued for the wrongs committed by her during the coverture. The question is whether he is "liable" for these wrongs, and I think the law has made it clearly apparent that he is not: it holds that the wife has no such existence as is necessary for her to appear as a suitor in her own right in court: she is liable for her own wrongs, but as she cannot be either plaintiff or defendant, her husband, though not liable, must be joined with her in the action; besides it would be purposeless to sue her without her husband, as her property is vested in him. It is clear that if the husband dies, the action goes on against the wife, and if she dies, the cause of action

is put an end to ; and as that is the case, it is clear to my mind that there is no cause of action against him ; but that he is joined because of the universal rule, that the wife during coverture cannot sue or be sued alone. That reason does not apply where there is a divorce à *vinculo*, and the wife is remitted to her former name, and made entirely free from her husband. She is then perfectly capable of suing and being sued, just as she was before she entered into the married state. The Legislature has provided that the husband shall not be liable for his wife's torts in the case of judicial separation, and *Head v. Briscoe* is an authority that without that provision he would have been liable ; but where there is a divorce à *vinculo* the interference of the Legislature is not necessary to effect the same object.

KEATING, J.—I am of the same opinion. As soon as it is established that the husband is joined for conformity, it follows that when the unity of the parties is put an end to, there ought to be an end also to the liability caused by that relation.

Rule discharged.

C. P. }
24 Nov. 1864. } SAUNDERS v. BEST.

Bankrupt—Contract to pay Premiums on Policy of Insurance—Proof by Surety—24 & 25 Vict. c. 134, s. 154.

Where a surety covenanted to pay the premiums on a life policy in default of his principal doing so, and the principal was adjudged bankrupt, and then failed to pay a premium, and the surety paid it :—

Held, in an action by the latter against the principal for the sum so paid, that after 24 & 25 Vict. c. 134, s. 154, a plea of bankruptcy was a good answer.

Declaration for money paid :

3rd plea, that the defendant "became bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before he so became bankrupt."

By deed of February, 1853, reciting that the defendant was entitled to a policy of insurance on his own life, under an annual premium of 10*l.* 19*s.* 2*d.*, and that he was indebted to one H, the defendant assigned the policy to H, and covenanted to pay the premiums and keep the policy on foot ; and the plaintiff covenanted that if the defendant made default therein he would do so. The defendant was adjudged bankrupt and obtained his certificate in 1862, and afterwards made default in the payment of a premium. The plaintiff paid this premium, and now sued the defendant for the amount.

At the trial before the Under-Sheriff, at Worcester, the jury found a verdict for the plaintiff.

Pritchard subsequently obtained a rule, pursuant to leave reserved, to enter the verdict for the defen-

dant or a nonsuit, on the ground (*inter alia*) that the third plea was a good answer to the action. In

Warburg v. Tucker, 5 El. & Bl. 384 ; El. B. & E. 914,

a case just like this, it was held, that the bankrupt's certificate of discharge was no bar to an action on a covenant to pay the premiums which had become due after the bankruptcy ; as the claim was not in respect of, nor a liability to pay money upon a contingency within the old Bankrupt Act, 12 & 13 Vict. c. 106, s. 178. The 154th section of the new Act, 24 & 25 Vict. c. 134, was intended to meet that case, and enacts,

"If any bankrupt shall, at the time of adjudication, be liable by reason of any contract or promise to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

J. O. Griffiths showed cause, and contended that 24 & 25 Vict. c. 134, s. 154, did not make the bankruptcy a bar to the action.

D. Seymour, Q.C., and *Pritchard*, in support of the rule, were not called on.

PER CURIAM.—The rule must be absolute for a nonsuit.

Rule absolute.

C. P. }
24 Nov. 1864. } DOGGETT v. CATTON.

Betting-house Act—Place used for betting—Deposit recoverable—16 & 17 Vict. c. 119, ss. 1, 5.

The defendant habitually made bets on horse-races under a tree in Hyde Park, and received deposits on bets there. The plaintiff, who had daily seen him betting there, took from him the odds against a certain horse winning a race, and deposited with him the amount of his stakes to abide the event of the race :—

Held, that the defendant had brought himself within the words of the Act 16 & 17 Vict. c. 119, as much as if he had been in the habit of betting and receiving deposits on bets in a house ; and that, consequently, by section 5 of the above Act, the plaintiff was entitled to recover from him the deposit he had made as money had and received to his use.

Declaration for money had and received : pleas, never indebted, and "that the money was deposited by the plaintiff with the defendant under a contract or

agreement by way of wagering and gaming, and illegally betting on horses running at races," &c.

At the trial before the Sheriff of Middlesex, on the 30th of last June, it was proved that on the 20th of October previous, the day of Witham Races in Lincolnshire, the plaintiff saw the defendant, with a large crowd of people, under some trees in Hyde Park. The defendant had a betting-book in his hand, containing a list of horses, and was betting on races, and offering odds against horses. The plaintiff at 12.30 p.m. took from him the odds of 6 to 1 against a horse called Flytrap for the Witham Handicap, and, in pursuance of this bet, deposited with him 5*l.* 10*s.* on condition that he was to receive back this sum and six times its amount, namely 38*l.* 10*s.*, if Flytrap won. The plaintiff had frequently seen the defendant betting at the same spot. On making the above-mentioned bet, the plaintiff's attention was called to a notice in the defendant's book, that all bets were "to stand on the day of the race, whether scratched or not." Two days afterwards, the plaintiff told the defendant that Flytrap was scratched four hours before the bet was made, and claimed the return of his deposit, which the defendant refused to make, on the ground that, as Flytrap had not won the race, he had won the bet. The plaintiff then brought this action for the deposit, but the jury found against him.

Yeatman subsequently obtained a rule, pursuant to leave reserved, to enter a verdict for the plaintiff for 5*l.* 10*s.*, on the ground that 16 & 17 Vict. c. 119, s. 5, entitled the plaintiff to recover as for money had and received to his use.

16 & 17 Vict. c. 119 (An Act for the Suppression of Betting-houses) enacts, by section 1, that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, &c., or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, &c., to pay or give thereafter any money or valuable thing on any event, or contingency of or relating to a horse-race," &c.

Section 5. "Any money or valuable thing received by such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, &c. as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received; and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any Court of competent jurisdiction."

Talfourd Salter now showed cause.

"Such person" in the fifth section is defined in the first, and he must be connected with the management

or use of a house, office, room, or other place; and "place" must be construed with reference to the words which precede it, and to the preamble. The preamble is aimed at "the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on the events of horse-races," &c. The place must be conducted for the benefit of the owner. A booth in the park would be within the Act, but in the extended sense now sought to be put upon it, the section would apply to every race-course in the kingdom.

Yeatman was not called upon to support the rule.

ERLE, C.J.—I am of opinion that this rule should be made absolute to enter a verdict for the plaintiff. The evidence was that the defendant was in the habit of betting generally with those persons who would take the risk, and who resorted to the place he used for the purpose of making these bets; namely, under a tree in Hyde Park. The plaintiff had seen him there at the same spot daily; and on this occasion he paid the defendant a deposit of 5*l.* 10*s.* on an agreement that it was to be restored six-fold if a certain horse won. That was a deposit on a contingency; and by 16 & 17 Vict. c. 119, s. 5, money received as a deposit on a bet by persons within the meaning of the Act may be recovered back. I think the words of the statute are wide enough to extend to this place; and that the defendant used this tree in Hyde Park, exhibited his betting-book there, and received deposits from persons who resorted to him for betting, so as to bring himself within the words of the statute. It was contended that "other place" must be *ejusdem generis* with the words house, office, and room, which precede it, and that it must be something in the nature of a structure; and it is admitted that a booth would satisfy the words of the Act. But I think the mischief is the same whether what goes on is under the shelter of a tree or of canvas, and that the words of the statute are wide enough to include the case of the tree. Then Mr. Salter says the preamble, as to the mischief to be remedied, narrows the construction I am putting on the Act. The demoralisation caused by betting-offices, was the mischief intended to be prevented; and I think it was intended, if other places than betting-offices were resorted to, to draw the line wide enough to prevent the recurrence of the mischief. The mischief is in the nature of a habit of using a place for receiving these deposits, and carrying on the business of an habitual gambler.

KEATING, J.—I am of the same opinion, though I had at first considerable doubts whether the words were large enough to reach this case. Our decision does not affect the legality of bets made in the street, or isolated transactions of that nature. If the parties had merely gone to Hyde Park, and met there, there

would, I think, be strong ground for Mr. Salter's argument; but the evidence is that the defendant habitually resorted there for this purpose.

Rule absolute.

C. P. } THE GENERAL DISCOUNT COMPANY
25 Nov. 1864. } v. STOKES.

Coram—ERLE, C.J., BYLES and KEATING, JJ.

Bankruptcy—What Proveable Under—12 & 13 Vict. c. 106, s. 178—"Liability to Pay Money upon a Contingency"—Shareholder in a Company—Calls after Bankruptcy—Certificate no Bar.

The liability of a shareholder in a company to pay future calls is not "a liability to pay money upon a contingency," within 12 & 13 Vict. c. 106, s. 178.

The defendant, a shareholder in plaintiffs' company, was adjudicated bankrupt on the 3rd of November, 1860. On the 14th of May, 1861, order made to wind up the company. On the 4th of July, 1861, call of 5l. 10s. made on each 10l. share (2l. 10s. originally paid up). On the 1st of February, 1864, plaintiffs sued defendant for this call. Defendant pleaded his certificate, obtained the 4th of February, 1862:—

Held, that the claim was not proveable under the bankruptcy; and, therefore, that the certificate was no bar.

Action against a shareholder for the amount of a call of 5l. 10s. per share on twenty 10l. shares held by the defendant in the plaintiffs' company.

Plea.—Bankruptcy and certificate.

Tried before Byles, J., in London, on the 29th of June.

Verdict for the plaintiffs for the amount claimed, with leave to the defendant to move to enter the verdict for him, if the Court should be of opinion that, on the facts admitted, the defendant was not liable.

Previous to 1860, the defendant became a shareholder, to the number of twenty shares, in the plaintiffs' company. 2l. 10s. was originally paid up on each 10l. share.

On the 3rd of November, 1860, the defendant was adjudicated a bankrupt.

On the 14th of May, 1861, an order was made for winding-up the plaintiffs' company.

On the 4th of July, 1861, a call of 5l. 10s. per share was made. The action was for 110l., the amount of that call.

On the 4th of February, 1862, the defendant obtained his certificate, under the Bankrupt Law Consolidation Act, 1849.

The action was brought on the 1st of January, 1864. The question for the Court was, whether the certificate was a bar to the action?

Archibald having obtained a rule to enter the verdict for the defendant, as above,

Kemp now showed cause.

The question is, whether this is a debt or a liability which could have been proved under section 177 or section 178 of 12 and 13 Vict. c. 106?

1st. This was not "a debt payable upon a contingency," within section 177,

South Staffordshire Railway Company v. Burnside, 5 Exch. 129.

That was decided on a similar section, 6 Geo. 4, c. 16, s. 56.

[*Archibald* said he could not contend that this was a debt within section 177.]

2nd. This was not "a liability to pay money upon a contingency," within section 178. Such liability must be capable of valuation at the time of the bankruptcy,

Thomas v. Hopkins, 29 L. J. C. P. 187.

[BYLES, J.—What kind of liability is within section 178?]

An ordinary case of guarantee, for instance.

He relied on

Warburg v. Tucker, 28 L. J. Q. B. 56 (Ex. Ch.).

That case gave rise to section 154 of the Bankruptcy Act of 1861.

Archibald, for the defendant, in support of the rule.

There were two breaches in *Warburg v. Tucker*, and the Court only positively decided on one. The opinion which they threw out on the other was contrary to

Young v. Winter, 16 C. B. 401; 24 L. J. C. P. 214.

The course of legislation has been to extend and enlarge the means of proof as far as possible. The liability to pay calls was "a liability to pay money upon a contingency," within section 178. The claim was proveable under the bankruptcy. It ripened into a proof when the call was made. The plaintiffs might have proved for such sum as the Court should think fit, though the claim might have been expunged.

[BYLES, J.—There were two uncertainties here—1st, whether any call would be made; 2nd, whether the defendant would be the holder of the shares.]

The contingency here was different from that in *Warburg v. Tucker*,

Ex parte Barwis, 25 L. J. Bkcy. 10;

Boyd v. Robins, 27 L. J. C. P. 299 (overruled on another ground in error);

Parker v. Ince, 28 L. J. Ex. 189.

[ERLE, C.J.—Is not this case within *Martin, B.'s* principle in *Parker v. Ince*, of there being a series of contingencies? If the plaintiffs could prove for one call they could prove for ten.]

I say the certificate is a bar to the claim, so far as it had ripened into a proof,

Adkins v. Farrington, 5 H. & N. 586.

[ERLE, C.J.—You say the company should have claimed, under the bankruptcy, some sum as a call?]

Yes. Such sum as the Court should think fit.

[ERLE, C.J.—Then the company would have had to disclose the state of their internal affairs.]

[BYLES, J.—This is the difficulty. Either the bankrupt is discharged from all calls, or else no bankruptcy can relieve him.]

I say he ought to be discharged as to this particular call.

He also referred to the Joint Stock Companies Act, 21 & 22 Vict. c. 60, s. 18.

ERLE, C.J.—I think this rule should be discharged. In effect, this is an action by a company against a shareholder for a call. This call was made under an order for winding-up the company; but the principle is the same as if it had been a continuing company. The question turns on the section 178 of the Act of 1849. *Prima facie*, the liability to future calls would seem to be "a liability to pay money upon a contingency." But the authorities are against such a construction. Here there is not a contingency, but a series of contingencies, as in *Parker v. Ince*. *Ex parte Barois* goes furthest in favour of Mr. Archibald's contention, but not far enough for this case. The company could not have come forward at the bankruptcy and said "This shareholder will probably be called on for the full amount of his shares." This must depend on the state and prospects of the company, and a disclosure of such prospects was not, I think, contemplated. It may be a hardship on a shareholder to continue with undefined liabilities, but he may relieve himself by successive bankruptcies. I think this claim was not proveable under the bankruptcy, and therefore is not barred by the certificate.

BYLES, J.—I am of the same opinion, though there is always a difficulty in these cases. There were two contingencies here; first, whether the call would be made at all; second, whether the defendant would, at the time of the call being made, be a holder, so as to be liable to pay. If we hold the certificate in such a case to be a discharge, the bankrupt may hold his shares discharged from the payment of all past and future calls, which is absurd. In the event of a call being made after bankruptcy, he must become bankrupt again, and so on *toties quoties*. I think the balance of authority coincides with the balance of convenience, in this case.

KEATING, J., concurred.

Rule discharged.

EX. { ATTORNEY-GENERAL v. MADELINE
21 Nov. 1864. { COUNTESS BLUCHER DE WAHLSTALL, and her Husband.

Domicil—Succession and Legacy Duty—Foreign Residence and English Domicil—Personal Property in England.

B, an Englishwoman, left England in 1849, and

lived with the defendants from that date at Baden-Baden, till her death in 1863, paying occasional visits only to England. All her personalty was vested in English securities. Her will, made in England, was made in conformity to the laws of England and Baden-Baden:—

Held, by the COURT, that her domicil was English, the rule being that a man's domicil is not changed unless he has done all in his power to divest himself of his former domicil, as laid down in Re Domingo Capdevielle, ante, 15.

The object of this information was to obtain from the defendant, the Countess Blucher de Wahlstall, sole executrix of the will of Justina Davidson Dallas, payment of legacy duty, in case she was at the time of her death domiciled in England; or payment of succession duty, in case the domicil of the testatrix at the time of her death was not English.

The facts of the case were as follows:

The testatrix was born at Brighton, and resided in England till the death of her last surviving parent, Lady Dallas, when she went to reside with her sister and her husband, the defendants, who were married in 1828, and are both domiciled, and for many years past have resided, at Baden-Baden. The testatrix lived with them until her death, and during that time had no other home.

On leaving England, the testatrix discharged her English maid and took a German maid, and she caused a large library, her only moveable property in England, to be sent to the house of the defendants at Baden, except her moneys and stock, consisting of cash, stock in the Bank of England, East India Stock, Consolidated 3½ per cent. Bank Annuities, Reduced 3½ per cent., and New 3½ per cent. Bank Annuities. She never returned to England, or left Baden-Baden, except for a few occasional visits, which she made with the defendant in 1850, 1854, 1857, 1859; and since then she never left Baden, until her death. From 1849 she contributed her share towards the expenses of the defendants' housekeeping. She often said that if she survived the defendant, her sister Madeline, she should continue to live in Germany, thereby meaning, as the defendant believes, in Baden-Baden, or the neighbourhood, and that nothing would induce her to return to England, except occasionally to visit one of her sisters.

In 1854, she said she wished to be buried at Lichtenthal, near Baden-Baden. Two years before she died, an additional room was built to the defendant's house at Baden-Baden solely for her use.

On the 1st of March, 1854, the testatrix made a will, duly executed, so as to be a proper formal will, in Baden-Baden, similar to the will she executed in England on the 6th of May, 1854.

During one of her visits to England, in the year 1854, while she was staying with her sister, the wife of Lieutenant-Colonel Passy, in London, the testatrix

made a will, in which she stated she was on a visit to her sister, Catherine Passy, and appointed her cousin, Henry Davidson, and her nephew, Robert Dallas, trustees, in carrying the same into execution; and gave to them all her real and personal estate, and directed the annual income thereof to be paid to her sister Madeline, Countess of Blucher, for life, for her separate use, without power of anticipation; and after her death the whole of her said property was to be applied in such manner as the said defendant, Madeline Blucher, should by deed or will appoint, and appointed her said sister, Madeline Blucher, to be her executrix. This will was executed and attested to be an effectual and valid will, both in Baden-Baden and this country. The testatrix died at Baden-Baden in 1863, and was buried at Lichtenthal.

The defendants refused to pay any legacy or succession duty in respect of the said property, and declined to do so, alleging that the testatrix was not, at the time of her death, domiciled in England, but was domiciled in Baden-Baden, and that, consequently, no duty was payable in this country.

The Attorney-General, The Solicitor-General, Locke, Q.C., and Hanson, for the Crown.

The Attorney-General.—The questions for the decision of the Court are, whether the testatrix was, at the time of her death, domiciled in England, if so, legacy duty will be payable; and, if she was not domiciled in England, whether succession duty is payable in respect of such part of her personal estate situate in this country. The burden of proving the change of domicile lies upon the parties who assert the change. The testatrix sometimes lived at Baden, and sometimes at Berlin, and expressed an intention after her sister's death of living in Germany. How can it be said, then, that the testatrix has acquired any new domicile.

As to the question of domicile, he cited,

Re Domingo Capdevielle, 5 N. R. 15, 2 H. & C. 85;

Moorhouse v. Lord, 10 H. of L. Ca. 272;

Phillimore on Domicil, c. 2, s. 15, p. 13 (122);

Whicker v. Hume, 13 Beav. 395; 7 H. of L. Ca. 184.

If the testatrix was not domiciled in England, legacy duty not being payable, succession duty will be,

Re Domingo Capdevielle (loc. cit.);

Re Wallops, 3 N. R. 679; 33 L. J. 351;

16 & 17 Vict. c. 51, ss. 18, 44.

Solicitor-General.—This case is governed by *de Capdevielle Case*—

1st. As to domicile.

2nd. As to payment of succession duty.

[POLLOCK, C.B.—A will ought to be executed according to the law of the domicile. The testatrix having made a will in England, is the strongest proof that at that time she thought she had an English domicile. What fact is there to show after making

that will, and on her return to Germany, she changed her intention?]

As to the second point, you will decide in accordance with the decisions of Bruce L.J., and Turner, L.J., in *Re Wallop's Trust*; unless you do not decide on overruling that decision, succession duty is payable, even if you decide the first point against the Crown.

Locke, Q.C.—It is not sufficient to prove that Miss Dallas intended to live abroad, but a particular country must be shown in which the person wishes to acquire a new domicile. That cannot be done here.

Coleridge, Q.C. and Hall, for the appellants,

As to the domicile, the facts show that the testatrix had intended *quatenus in illa exuere patriam*. The question of a change of domicile is a question of intention. The intention is to be inferred from the facts, which in this case form the strongest proof of her intention to do so. The English will was merely a copy of the German one. Short of naturalisation she did everything in her power to acquire a fresh domicile.

As the second point, he cited,

Aikman v. Aikman, 3 Macq. 877;

Thompson v. Advocate-General, 12 Cl. & Fin. 1.

POLLOCK, C.B.—I shall follow the rule laid down in *Re Domingo Capdevielle*, that a man's domicile is not changed unless he has done all in his power to divest himself of his former domicile.

There is not sufficient evidence in this case to show that the testatrix intended to change her domicile. If any one had asked her during her life if she had an English or German domicile, she would have answered, I know nothing about domicile; I do not want to become a German, but I prefer living in Germany, which is a very different thing from saying, I wish to become a German. It is very difficult to say how a single lady can change her domicile. I cannot say with Mr. Hall that an unprejudiced mind would be satisfied that a young lady who intended to stay some years abroad, wishes to change her domicile because she takes her library with her.

BRAMWELL, B.—I am of the same opinion, there is no evidence of change of domicile. The rule is, that the old domicile remains till a new one is acquired. I entirely agree with Lord Chelmsford's decision in *Moorhouse v. Lord*. The question, therefore, is, whether the testatrix had intentionally and actually abandoned her English domicile with the intention never to revert to it. I think she was domiciled in England at the time of her death. I entirely adopt my Brothers' views; I do not see that she ever acquired a new domicile.

CHANNELL, B.—I am of the same opinion. I think the rule laid down by Lord Wensleydale in *Aikman v. Aikman* the correct one; namely, that every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his old one.

This change must be *de facto et animo*, and the burden of proof unquestionably lies upon the party who asserts the change. Therefore the question is, whether the proof offered by the defendants shows that the testatrix had such an intention. It does not do so.

Judgment for the Crown.

Ex. } CADDICK v. TERRY.
23 Nov. 1864.

Misdirection—New Trial—Contract.

C gave T an order to see some hops, which consisted of eleven pockets, and have a sample drawn. After some correspondence concerning them, T wrote to C, and made an offer for ten pockets, which C accepted by letter, and forwarded eleven pockets. Upon C suing T for the value of the hops, the Judge ruled that C and T were bound by the letters containing the offer and acceptance:—

Held, that the judge misdirected the jury in not leaving the whole of the facts and correspondence to them to decide what the contract was:—

The plaintiff sued the defendant for goods bargained and sold, and for goods sold and delivered, and for money found to be due on an account stated and claimed—23l. 5s.

The defendant pleaded the general issue.

The action was tried at the last Worcester Assizes, before Shee, J.

The facts of the case are as follows:—

The plaintiff met the defendant at Worcester market, on the 26th of September, 1863, and offered him some hops of the 1863 growth; and the plaintiff told the defendant that he had some 1855 and 1859 hops at Mr. Woodhouse's warehouse, and gave him an order to see the hops and take a sample of them. He accordingly went to the warehouse, and was present while a sample was being drawn from them, and thought there were ten pockets of hops. The plaintiff wrote to the defendant, on the 8th of October, 1863, and asked him if he had seen the old hops, and what he thought of them. The defendant, in answer, on the 9th of October, said that he had seen the old hops in Worcester: the 1859's were fresh, and that if he should have any inquiry for old hops, he would bear them in mind.

On the 5th of November, the defendant wrote to ask if he could sell four or five pockets, what would the plaintiff take for them? that he would have to name a very low price.

On the 12th plaintiff wrote and said, "As you have seen the hops, you know their market worth, and I have no doubt you will do the best you can for me. You may have them, and I must leave the price with you. This letter will, no doubt, be sufficient to enable you to get them delivered."

On the 16th of November, 1863, the defendant

wrote to the plaintiff: "The most we can give you for your ten pockets of 1859 would be 30s. per cwt."

On the 21st of November the plaintiff wrote to the defendant: "In answer to your letter, I accept your offer of 30s. per cwt. I will write to Woodhouse to have them weighed."

On the 23rd of November, 1863, the plaintiff wrote to the defendant: "There are eleven pockets. I will have them weighed, and will send them to you."

The hops were accordingly sent, and after their arrival, on the 26th of November, 1863, the defendant wrote and told the plaintiff that the whole of the hops were not equal to sample, which appears to have been drawn from the best pocket, and that there was only one other pocket anything like it, and asked the plaintiff to send for them back.

Shee, J., refused to leave to the jury the question, whether it was sale by sample or not? Whether the defendant had an opportunity of seeing the bulk at the warehouse? And ruled that the parties were bound by the written contract contained in the letters of the 16th and 21st of November, to buy the whole lot of 1859 hops, and that that was the only question for the jury. The verdict was directed to be entered for the plaintiff for the sum claimed.

Huddleston, Q.C., obtained a rule ordering the plaintiff to show cause why the verdict should not be set aside, and a verdict or a nonsuit entered, upon the ground that upon the correspondence and the evidence there was no contract for the sale of eleven pockets of hops; or why a new trial should not be had on the ground of the misdirection of the Judge, for refusing to leave to the jury whether the sale was a sale by sample, and whether the bulk corresponded with the sample, and whether the defendant had an opportunity of seeing the bulk at the warehouse, and whether they were merchantable hops, and whether they answered the description of 1859 hops.

Gray, Q.C., and *Macnamara*, now showed cause.

There is no evidence that there is a sale by sample. It was a sale of the whole bulk.

The two letters of the 16th and 21st of November, form the contract.

[CHANNELL, B.—Where there are several letters, is not their effect a question for the jury?]

No. For the Judge.

[POLLOCK, C.B.—Where the contract is the result of several letters, the effect of that contract is a question for the jury. The intervals between the letters make a difference in the conclusion to be drawn. There are elements then in the case that commercial men can only judge of.]

[CHANNELL, B.—Jervis, C.J., says, if the contract lies in one letter, the Judge is to decide on the effect of it. If in several, the jury are to do so.]

This is a sale of a specific article. Even if it was a sale by sample, the Judge was right.

By virtue of the contract the property passes where

there is a sale by sample of a specific article. But this is not so where there is a sale by sample of part of a bulk,

Street v. Blay, 2 B. & Ad. 463.

[POLLOCK, C.B.—If an article is warranted in a shop, and the price has not been paid, and before the purchaser leaves the shop, finds that it does not answer to the warranty, he may return it; and this would be a good defence to an action on the price.]

They cited,

Dawson v. Collins, 10 C. B. 523.

The letters of the 16th and 23rd are the whole of the contract. It is for the Court to put a construction on them,

Syers v. Jonas, 2 Exch. 111.

Ten pockets in the letter is to be read eleven pockets; it is merely a *falsa demonstratio*. The plaintiff ought to recover the full price, if the goods are not equal to sample. The defendant can give evidence of it in reduction of damages, or bring a cross-action.

When the property has vested, and has been delivered, the incident of returning it cannot be added,

Trueman v. Loder, 11 Ad. & E. 589.

Such an incident, as sale by sample, is inconsistent with the contract which is contained in the two letters; therefore it cannot be added,

Syers v. Jonas (*loc. cit.*).

The incident of sale by sample, added to right of returning the property, is inconsistent with the written contract.

Huddleston, Q.C., supported the rule.

There is no contract for eleven pockets. The whole correspondence must be looked at. The contract is to be gathered from the series of letters, and not from the two letters,

Wilkinson v. Grant, 18 C. B. 318.

If there was not a sale by sample, and no opportunity of seeing the goods, then there is an implied warranty that the goods are of a merchantable quality of the denomination mentioned in the contract,

Gardiner v. Gray, 4 Camp. 144;

Wheeler v. Schilizzi, 17 C. B. 619.

The whole question ought to be left to the jury, to say whether there was a sale by sample. The buyer had no opportunity of examining the bulk before the hops were sent him. He had, therefore, a right to refuse them if they were not a merchantable article.

Matthews followed, and contended that there was a sale by sample from the correspondence and from the evidence, and cited,

Lockett v. Nickling, 2 Exch. 93;

Syers v. Jonas, (*loc. cit.*);

Cooke v. Riddellieu, 1 C. & K. 561;

Parkes v. Smith, 15 Q. B. 297.

POLLOCK, C.B.—The Court cannot direct that a verdict should be entered for the defendant, or a nonsuit entered on the first ground, that upon the corre-

spondence and the evidence there was no contract for the sale of the eleven pockets of hops. The Court is of opinion that that is a question for the jury, and that what the contract was, is not to be decided by the two letters, but by the whole of the correspondence and the facts, and that the learned Judge misdirected the jury in leaving the case as he did. It is impossible in this case to lose sight of the facts that the defendant saw a sample of the hops drawn, and that there were several conversations and letters written about them, yet the Court is asked to judge of the contract from the two letters only. The Court, therefore, makes the rule absolute for a new trial, on the ground that the whole of the correspondence, together with the other facts in the case, ought to have been submitted to the jury, to decide on what the contract was. Upon the other points, as there is to be a new trial, the Court will not give any opinion.

CHANNELL and PIGOTT, BB., concurred.

Rule absolute.

Bail Court.
24 Nov. 1864.

In the Matter of an Arbitration
between KELLETT v. THE LOCAL
BOARD OF HEALTH OF THE DIS-
TRICT OF TRANMERE.

*Award—Public Health Act—Common Law
Procedure Act.*

An umpire appointed under the provisions of the statute 11 & 12 Vict. c. 63 (the Public Health Act, 1848), cannot make his award after the expiration of twenty-one days from the date of his appointment, unless the time for making his award has been duly extended according to the provisions of the statute:

Seemle, he may extend the time for making his award before the duty of proceeding with the award devolves upon him.

The provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 15, with reference to enlarging the time for making an award, do not apply to a case where an umpire appointed under the Public Health Act, 1848, has neglected to make his award within the time prescribed by the latter statute.

On a previous day *Francis Russell* obtained a rule calling upon the Local District Board of Tranmere to show cause why an award should not be set aside on the ground that it was not made within the time prescribed by law.

The 69th section of the Public Health Act, 1848, gives the Local Board power to require the owner of premises fronting upon any street within their jurisdiction to pay expenses incurred by the Board in making sewers and executing other works specified, and provides that the expenses shall be paid by the owners in such proportion as shall be settled by the surveyor, or in case of dispute, as shall be settled by arbitration in the manner provided by the Act.

Section 123 enacts that in case of any matter which by the Act is authorized to be settled by arbitration, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, shall appoint an arbitrator to whom the matter shall be referred.

Section 124 enacts, that in case a single arbitrator fail to make his award within twenty-one days after his appointment, or within such extended time, if any, as shall have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration under the provisions of the Act, as if no former reference had been made.

Section 125 enacts, that in case there be more than one arbitrator, the arbitrators shall, before they enter upon the reference, appoint by writing under their hands an umpire; and in case the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time, if any, as shall have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire; and further, that the provisions of the Act with respect to the time for making an award, and with respect to extending the same in the case of a single arbitrator, shall apply to an umpirage.

Kellett was the owner of premises adjoining a street within the jurisdiction of the Local Board of Health for the district of Tranmere, and he was liable to pay a portion of the expenses incurred by the Board in making sewers. A dispute having arisen as to the amount to be paid by him, proceedings were taken to have the difference settled by arbitration, in the manner provided by the Act.

The Local Board appointed an arbitrator on the 5th of January, 1864, and Kellett appointed an arbitrator on the 15th of January, 1864. On the 3rd of February, 1864, the two arbitrators appointed an umpire. The arbitrators proceeded with the arbitration, and extended the time for making their award up to the 30th of April, 1864; but they made no award, and did not further enlarge the time. Accordingly, on the 30th of April, the duty of proceeding with the arbitration and making the award devolved upon the umpire. He made his award on the 2nd of May, 1864.

Lush, Q. C., showed cause.

It was never intended that the umpire should be limited to the period of twenty-one days, from the time of his appointment by the arbitrators, for making his award. It is sufficient to satisfy the statute that he should make his award within twenty-one days from the time the duty of proceeding with the arbitration devolved upon him. He has no power to act until the arbitrators fail to make their award; and if the period of twenty-one days is to date from the time of his original appointment, the time for making his award might expire before the duty of proceeding with

the arbitration devolved upon him. Such a result could not be contemplated by the Legislature.

Francis Russell, in support of the rule.

A single arbitrator must make his award within twenty-one days after his appointment; and the Act provides that the provisions with respect to extending the time in the case of a single arbitrator, shall apply to an umpirage. There is no reason why the word *appointment* should not be understood in its natural sense. No inconvenience arises from this construction of the Act, because the umpire has power to extend the time for making his award as soon as he is appointed, and before the duty of making the award devolves upon him,

Doddington v. Railward, 7 Dow. 640.

A cross-rule having been obtained by *Lush* to enlarge the time for making the award,

Russell now showed cause against the cross rule.

Lush argued in support of the rule. He cited,

The Common Law Procedure Act, 1854, s. 15;

Ward v. The Secretary at War, 32 L. J. Q. B. 53.

SHEP, J.—I am of opinion that the first rule should be made absolute. The Act of Parliament provides that a single arbitrator shall make his award within twenty-one days from his appointment, and that an umpire shall be placed in the same position as a single arbitrator. It is the duty of the Court to give effect to these enactments. It was contended that the appointment of the arbitrator did not really take place until his duties had commenced, and as an argument in favour of this construction, it was urged that it would lead, in many cases, to a failure of justice if the words of the statute were literally adhered to. No doubt great inconvenience would arise in cases where the duty of proceeding with the arbitration did not devolve upon the arbitrator until twenty-one days after his appointment, if he had no power of enlarging the time beforehand. But I think the case cited shows that he may enlarge the time at any time after his appointment; he need not wait until the duty of proceeding with the arbitration devolves upon him. There is, therefore, no difficulty in giving effect to the plain words of the statute. The other rule must be discharged. It is clearly intended by the Public Health Act, that the arbitration should be concluded within a fixed time. There is nothing in the Common Law Procedure Act to overrule the express enactments in the Public Health Act. It is admitted that the provisions of the 3 & 4 Will. 4, c. 42, s. 39, do not apply.

Rule absolute to set aside the award.

Adm.
20, 21, 22, 23 JULY, } THE NORWAY.
22 Nov. 1864.

Before the Right Honourable DR. LUSHINGTON.

"Assignee"—24 Vict. c. 10, s. 6—Charter Party—Bill of Lading—Guarantee as to capacity and draught of Ship—"Freight"—Lump Freight—Jettison and Sale—Address Commission—"Perils of the Seas"—Non-production of Papers—Constructive Waiver of Tender—Delivery—Pilot voluntarily taken.

What circumstances are sufficient to constitute a person an "assignee" of a bill of lading within the meaning of the 6th section of the Admiralty Court Act, 1861, so as to enable him to sue the vessel for breaches of duty by the master.

The owner of the ship is responsible for all the consequences of the negligence of a pilot, taken voluntarily and not under compulsion of law.

Jettison and sale of damaged goods are such consequences, and are not perils of the sea, if they were made necessary on account of injury which has been received by the ship and cargo through the negligence of a pilot so taken.

In all cases of short delivery, under a bill of lading, a deduction may be made from the freight, of such proportion of the freight as would have been payable if the goods had been delivered, and this, even though the freight be lump freight; but the value of the goods not brought to destination may not be deducted from freight, but may be the subject of a separate action.

Non-production by the master of papers and information, to enable the consignee of the goods comprised in a bill of lading to verify the justice of the claim made for freight and general average, coupled with a refusal to deliver, except on payment of the sum claimed, is a "breach of duty" within the 6th section of the Admiralty Court Act, 1861, and exempts the consignee from the necessity of making a tender.

The refusal of the master to deliver, except on payment of an unjust demand for freight, and his persistent rejection of any compromise, constitute a constructive waiver of tender.

Personal delivery of cargo shipped is not necessary; the usage of trade constitutes a delivery on a wharf, with notice to the consignee, sufficient.

In estimating the damages for non-delivery of cargo, the Court will not take into account that the consignee might have prevented some damage if he had availed himself of the privileges of the 70th and 71st sections of the Merchant Shipping Amendment Act, to obtain possession of his cargo—that privilege being conditional upon the consignee depositing with the wharfinger the full amount claimed by the master.

A vessel is chartered in London to bring a cargo from a river-port in India, and is guaranteed "to carry 3000 tons upon a draught of 26 feet of water":—

Held, this guarantee is not a promise to carry 3000 tons, but a guarantee—

1st. That the vessel is capable of carrying 3000 tons.

2nd. That it is capable of carrying that weight upon a draught of 26 feet:

Held also, that the guarantee as to the vessel's draught had reference, not to her ordinary sea-going draught, but to her draught in her passage from the river-port to the sea; that is, her draught in fresh water.

This cause had been before the Court upon motion by the defendants to reject the petition. *Ante*, 3 N. R. 612, where will be found set out the principal documents, and a copy of the petition which states the facts. The Court ordered the petition to be amended in certain respects.

The amended petition now came on to be heard on its merits. Oral evidence was taken, and the case fully argued by counsel. With regard to the evidence the learned Judge found the following facts proved:

With regard to the relation of De Mattos & Ashburner:—The original agreement had been, that the homeward shipment should be on joint account of De Mattos and the firm of Ashburner & Co., each a moiety: the firm of Ashburner & Co. to purchase the cargo and to manage the matter of the shipment. The cargo was shipped at Rangoon, by the Burmah Company, on behalf of Ashburner & Co., the bills of lading were endorsed by the Burmah Company and their agent to Ashburner & Co., at Calcutta. Ashburner & Co. drew bills upon De Mattos for the whole amount of the purchase-money, and sent these bills and also the bills of lading, to the Union Bank in England, with instructions to the effect that De Mattos would accept the bills of exchange and, when the time was due, pay their amount into the bank to the credit of Ashburner & Co.; when this was paid, and not before, the bank was to hand over the bills of lading to De Mattos. The bank of course had a lien upon the bills of lading, to secure the current account of Ashburner & Co. with the bank. De Mattos did accept the bills, but the delay of the vessel at the Mauritius, which prevented her from arriving before the bills became due, caused him to make a new arrangement with Ashburner, the plaintiff, to the effect that the plaintiff should withdraw the bills from circulation, at a cost of some 3,500*l.*, and that the plaintiff should have an assignment from De Mattos of his moiety of the cargo, upon trust to appropriate the proceeds as follows:—1st. To satisfy one half of the price of the cargo. 2nd. To reimburse himself the 3,500*l.* 3rd. To apply the remainder towards paying off the debt (then 13,000*l.*) due from De Mattos to the plaintiff personally upon their general account. On the arrival of the vessel at Liverpool the Union Bank

gave up the bills of lading to the plaintiff. De Mattos stopped payment pending the negotiations between the plaintiff and the master as to the freight.

The Court also found as follows :—

The vessel had been loaded at Rangoon and Hastings to the full extent named as safe by Captain Brooking, the master superintendent, in conjunction with Mr. Cator, the freighter's agent—viz., to 25 feet : at that draught she carried only 2,698 tons. At a draught of 26 feet, she would, in the fresh water of the Irawaddy, have been able to carry 2,918 tons ; but in salt water, she would have been able to carry full 3000 tons. With this cargo on board, "The Norway" went down the Irawaddy in charge of a pilot, who was voluntarily employed by the master : in doing so she got aground upon a shoal, and this grounding was attributable to the negligence of the pilot. "The Norway" was got off after a few hours, and then proceeded on her voyage, it being thought she had received no mischief ; but after a few days the vessel began to leak. Jettison was made by the master of some part of the goods, and eventually the vessel put in at Mauritius, where cargo was discharged, and the ship repaired : the damaged part of the cargo was sold, and the rest reloaded. On the arrival of the vessel at Liverpool, a dispute arose as to the amount of freight due : the plaintiff offered to pay the undisputed portion at once to the master, and to deposit the disputed portion with a bank, to abide a reference : the master claimed an excessive sum, and without going the length of refusing to deliver any part of the cargo until the whole of the sum claimed had been paid, insisted upon retaining in his possession sufficient of the plaintiffs' goods to cover his full demand, and thus never relaxed his lien for the full sum claimed, and throughout rejected any idea of compromise : the master also failed to establish that he had furnished the plaintiff with the papers and information necessary for him to verify the justice of the master's claim. The master did not take the vessel into one of the closed docks, as he was requested by the plaintiff, but into the Canada Dock. The Canada Dock is an open dock, but furnished with sheds ; and it appeared that rice cargoes were not unfrequently discharged there, and could be there assorted, if sufficiently-skilled servants were employed. Then the master, on failure of the negotiations, entered the cargo in his own name, and employed a master-porter to superintend the unloading. The cargo was unloaded, but no assortment was made. The plaintiff then instituted this suit. Subsequently, in accordance with a suggestion made by the Court, the plaintiff applied for and obtained an order that, on payment by him to the master of 3,461*l.*, 13*s.* 2*d.* (the balance of freight stated by the plaintiff to be due in respect of the cargo) ; and on the plaintiff depositing in the Registry a note for 5,250*l.*, to answer any further claims of the master for freight and general average ; and on the bills of lading being filed in the Registry ; and on an undertaking

being given by the plaintiff to indemnify the defendants against any loss that they might sustain through the delivery of the cargo, the cargo should be released, and possession given to the plaintiff. And on the 5th of April, under another order of the Court, made by consent, the plaintiff paid to Messrs. Taylor, the defendants' agents in respect of the cargo, 845*l.* 6*s.* 8*d.* landing charges, reserving any question in respect of the same for the decision of the Court. The cargo was then taken possession of, and sold by the plaintiff.

Lush, Q.C., and *Lushington*, for the plaintiff.

1st. The plaintiff had the beneficial interest in the whole of the cargo, and was therefore entitled to sue under the 6th section of the Admiralty Court Act, 1861.

2nd. As to the charter-party.

(a.) The guarantee in the charter-party was a promise to carry 3000 tons, and therefore there was a deficiency of about 300 tons.

(b.) The master had no lien for the one-third of the freight payable before delivery of the cargo on the arrival of the vessel at Liverpool. That was not freight.

3rd. As to damages for jettison and sale.

(a.) The shipowner is responsible for the loss thus occasioned, because it was the ulterior consequence of the negligence of himself or his agents,

Davis v. Garrett, 4 Moo. & P. 540 ;

Siordet v. Hall, 4 Bing. 607 ;

Lloyd v. Iron Screw Navigation Company, 4 N. R. 292.

(b.) Though the freight was lump freight, the plaintiff was entitled to deduct so much as would have been payable as freight for the goods jettisoned and sold. For, by strict right, if the master fails to bring home any part of the cargo, he loses the whole of his lump cargo,

Bright v. Cowper, 1 Brownlow, 21.

4th. As to damages for goods brought to Liverpool.

(a.) The plaintiff was exempted from making a tender, because—

(1.) The master made an exorbitant demand for freight, and would not listen to any proposition for compromise,

Kerford v. Mondel, 28 L. J. Ex. 303.

(2.) The master did not furnish the proper papers, showing what freight was due, *Machl.* 587.

(b.) The master was bound to unload the vessel in one of the closed docks, because—

(1.) They were the docks named in the charter-party,

Merchant Shipping Amendment Act, section 67, par. 3.

(2.) They were the only customary docks for the discharge of rice cargoes,

Merchant Shipping Amendment Act, section 67, par. 4.

(3.) The plaintiff so directed the master.

(c.) The sound goods were not separated from the unsound.

(d.) The rice was not assorted.

(e.) The plaintiff is entitled to the interest upon the value of his cargo, from the time when the master ought to have given him possession, to the time when he did give possession.

Brett, Q. C., and Cohen, for the defendants.

1st. The plaintiff is not entitled to sue, at all events alone. Besides the plaintiff, his partners, and De Mattos and also the Bank were interested in the cargo.

2nd. The guarantee in the charter-party was only that the ship was capable of carrying 3000 tons, and that upon a draught of 26 feet of water. Water means salt water, the reference being to the ordinary sea-going draft of the vessel,

Pust v. Dowie, L. J. (June, 1864) Q. B. 172.

The guarantee, therefore, was fulfilled.

3rd. As to damages in respect of jettison and sale,

These were the result of the perils of the seas; but if of the pilot's negligence, the defendants are not responsible.

The freight is lump freight. If any part of the goods arrive at their destination, the whole lump freight is payable—it cannot be apportioned. Freight can be deducted only where it is payable by the tale,

The Salacia, 1 N. R. 195.

4th. As to damages in respect of goods brought to Liverpool,

(a.) The plaintiff made no tender, and nothing was done to waive tender.

(b.) The master was not bound to go into a particular dock in order to deliver,

Brown v. Johnson, 10 M. & W. 331;

Brereton v. Chapman, 7 Bing. 559.

(c.) The master was not bound to assort, as the plaintiff had not made entry of the goods,

Merchant Shipping Amendment Act, s. 67, par. 6.

It is no part of the ordinary duty of the master-porter to assort,

Mersey Docks Consolidation Act, 1858, s. 35;

but if otherwise, it is he, and not the defendants, who is answerable to the plaintiff.

The plaintiff might have got possession of his cargo under the Merchant Shipping Amendment Act, s. 70.

DR. LUSHINGTON.—I will first deal with the preliminary objection taken by the defendants to the right of the plaintiff to sue on the ground that he was not beneficially entitled to the cargo comprised in the bills of lading assigned to him. I adhere to my decision in *The St. Cloud*, 1 N. R. 244, that under the 6th section of the Admiralty Court Act, 1861, the Court will not entertain a claim made by a bare assignee of a bill of lading. But in this case, under the new arrangement made with De Mattos, the plaintiff remained, as before, the legal holder of the bills of lading, but was now free from the lien of the Bank, and free also from any undertaking to assign them to De

Mattos; and as to the cargo comprised in the bills, he remained, as before, entitled to one-half as representative of his firm, but he became as to the other half equitable assignee from De Mattos upon trusts substantially for the benefit of Ashburner, personally and also as the representative of his firm. De Mattos ceased to be interested in this cargo, except that it was to his advantage that the cargo should turn out well; for the higher price it fetched, the greater, of course, would be the reduction of his debt to Ashburner. Under these circumstances, I am of opinion that the plaintiff not only was the legal holder of these bills of lading, but also that by the assignment the "property comprised in the bills of lading passed to him," as an individual person and as the representative of his firm, and I hold that he has a right to sue the defendants' ship under the 6th section of the Admiralty Court Act, 1861.

I proceed to the merits of the case. First, then, as to the construction of the charter-party and bills of lading. The freight is stated in the bills of lading to be "freight payable as per charter." The Court is therefore referred to the charter-party, but only for the purpose of ascertaining the amount of freight. What, then, are the stipulations in the charter as to freight? I think they occupy the whole clause beginning with "In consideration of," and ending "less three months' interest." After naming 11,250*l.* as the freight payable if the ship is ordered to the United Kingdom, the charter-party contains these words: "The master guaranteeing to carry 3000 tons dead weight of cargo upon a draught of 26 feet of water, or to forfeit freight in proportion to deficiency." I think this guarantee is a twofold one, viz., first, that the ship was large enough to carry 3000 tons; second, that her build was such that she could carry the 3000 tons upon a draught of 26 feet of water. I hold that it was not a promise on the part of the master that in this particular voyage home he would carry 3000 tons; for at the time when the charter was executed, it was not settled for certain from what port the vessel should reload for the home voyage. The selection lay with the freighter: he might choose either Calcutta, Rangoon, Akyab, or Bassein, and it was not impossible that the river-channel from one of these ports might not be navigable for a vessel drawing 26 feet of water. The shipowner, therefore, could not with prudence have covenanted absolutely to carry 3000 tons. What he covenanted was, that his vessel was capable of carrying 3000 tons, and this upon a draught of 26 feet of water; and further, that she should take on board a full cargo compatible with safety. Hence, after the guarantee is added the clause, "the vessel to be loaded at port of lading to such draught of water as the freighter or his agents may, in connection with the Pilot Commissioners, consider safe to proceed to sea." The interest of the freighter was thus to be protected by his agent, the safety of the vessel by the Pilot Commissioners. I think this covenant as to the loading of the vessel

was a separate covenant from the previous covenant as to her capacity in connection with her draught, and that the clause of "forfeiture in proportion to the deficiency" refers, as its place denotes, only to the first covenant, and not to the covenant as to loading; though, if through the default of the master the vessel had not been loaded to the draught which the freighter's agent and the Pilot Commissioners had pronounced safe, the charterer would have had a right of action for damages.

The guarantee then being, as I hold, a guarantee that the vessel was of a capacity to carry 3000 tons, and this "upon a draught of 26 feet of water," a further question arises, what is the meaning of the word "water"? Does it mean fresh water as well as salt water, or only salt water? The question is of importance, because it is clear that the vessel could carry 3000 tons of cargo in sea water at a draught of 26 feet, but that she could not do so in fresh water. On this point I think that the fair inference from the charter is, that in making a guarantee as to the capacity and draught of his ship to an intended shipper of cargo, the master contemplated the *locus in quo* of the shipment; viz., a river-port in India, separated from the sea by a river channel, and where the water necessarily was more or less fresh. The taking in cargo at sea was not contemplated; this is shown by the provision as to "loading to such a draught as might be safe for the vessel to proceed to sea," and by the provision that "lighterage, if any, to fill up the ship, below the flats should be at the freighter's expense." I think, therefore, that the guarantee meant that the vessel should be capable of carrying 3000 tons upon a draught of 26 feet, during the whole time of taking in, and until she reached the open sea—that is during the whole period when the question of draught could be of any importance, and I do not accede to the argument on the part of the defendants that this guarantee by the master had reference to the ordinary sea-going draught of the vessel, and that it was left to the charterer to take into account for himself the difference, however well-known, of the draught of a vessel in fresh water from the draught of the same vessel in salt water. Nor do I consider that the case of *Pust v. Dowie*, (L. J. (June, 1864) Q. B. 172), to which I was referred, is applicable to the present case. Accordingly, inasmuch as at Hastings, where the loading was completed, the vessel could not carry 3000 tons upon a draught of 26 feet. I am of opinion that the guarantee was broken, and that forfeiture of freight must take effect.

It still remains to interpret the phrase "to forfeit freight in proportion to the deficiency." By "freight" I think is meant the only thing that is called freight in the charter, the lump freight, which, under the circumstances that have actually happened, is 11,250*l*. I think it quite clear that in fixing the freight the parties to the charter-party were looking to the home cargo only; in truth, the object of the adventure was not the carrying out salt, but the bringing home rice.

And by "the deficiency" is meant the difference between 3000 tons, which the vessel was guaranteed to be capable of carrying upon a draught of 26 feet of water, and the 2918 tons which, on the evidence of the master, it appears she could actually have carried on that draught in the Irawaddy: in other words, the allowance will be on the deficiency of 82 tons. The exact sum will be ascertained by the Registrar and merchants. Further, I am of opinion that the master had a lien for the whole of the balance of the freight: that is, not only for the two-thirds of that balance, which was payable by bills upon the true and final delivery of the cargo at the port of discharge, but also (in virtue of the lien which he had reserved to himself in express terms at the end of the charter-party) upon the one-third of the balance payable in cash on arrival of the vessel at the port of delivery.

Then as to the right of the plaintiff to deduct address commission from the freight. Evidence was given on behalf of the plaintiff that in a case like the present,—where the bills of lading declare the "freight to be payable as per charter-party," and the charter-party provides that "the vessel should be addressed at all parts to the freighter's agent, paying one commission only on the charter not exceeding 5*l*. per cent.": and the bills of lading comprise the whole of the cargo, and pass into the hands of a single person:—then, by universal custom, the holder of the bills of lading, although not the formal assignee of the charter-party, deducts the address commission from the freight. The defendants gave no evidence to the contrary, but as this is an important question, and as it may be a matter of some delicacy to distinguish between a custom that ordinarily prevails upon a friendly settlement of freight and a custom of so universal a character that it may be enforced *in invitum*, I shall refer this question to the Registrar and merchants. I shall also refer to them to ascertain the rate of interest that should be allowed on the advances.

Next, as to the claim for damages on account of the jettison and sale of the plaintiff's goods, which are alleged to have been wrongfully made. The defence is, that the jettison and sale were in consequence of the perils of the sea, and that by the provisions of the bill of lading the shipowner was expressly exempted from all responsibility on this account. But do the facts sustain the defence? It has been proved that the grounding of "The Norway" on the Hastings Shoal is to be attributed to the negligence or want of skill of the pilot in charge of her—the master having wholly abandoned the care of her; and it is admitted by the master and mate that the leak which afterwards was found in her was the consequence of this grounding, and not of bad weather. If so, then, though the jettison may have been necessary to avoid perils of the sea, and though the sale was confined to such part of the cargo as was found to be damaged when the whole cargo had been discharged at the Mauritius for the purpose of repairing the ship, then both the jettison

and the sale were really the consequences of the negligence of the pilot, and then, in accordance with the cases cited on behalf of the plaintiff, the person who is answerable for the negligence of the pilot is answerable for the consequences of that negligence. I think the shipowner, and therefore, in this case, under the provisions of the statute, the ship is answerable for the negligence of the pilot on that occasion. The pilot was employed by the authority of the master; he was not taken by compulsion of law. In cases of collision the shipowner is always responsible for the conduct of the pilot, to whom he has voluntarily committed the charge of the vessel; and I can discover no sound reason why the same principle should not be applied as between the shipowner and the owner of goods damaged or lost by the default of a pilot not taken under compulsion. In each case the loss arises from the fault of the agent of the master.

The plaintiff therefore is entitled to an indemnity from the defendants for his goods, which, in the eye of the law, the defendants have wrongfully thrown overboard, and wrongfully sold. An indemnity—what is an indemnity? and in what form is it to be made? Indemnity to the plaintiff clearly consists in recouping to him the loss which he has suffered in consequence of his goods having been thrown overboard and sold, instead of having been duly delivered to him; and that loss as clearly amounts to the value of the goods in a sound state at the time and place of delivery, less the freight payable on account of the same goods, less also necessary charges. This, for shortness, I may call the nett value.

How, then, is this indemnity to be effected? There are three modes which may be considered:—1st. For the plaintiff to deduct from the full freight his full loss, viz., the nett value. 2nd. For the plaintiff to deduct nothing, but first to pay the full freight, and then recover by action his full loss, viz., the nett value. 3rd. For the plaintiff to deduct from the full freight the freight of the goods thrown overboard and sold, and then by action to recover the residue of his loss. In the end, if all parties are solvent, each of these modes comes to the same thing; but it is important to distinguish them, in order that the shipper may be able to ascertain the amount of freight for which the shipowner has a lien, and which he the shipper is bound to tender before he can become entitled to claim delivery of the rest of his goods brought to their destination. Now the first of these modes, by which the shipper would deduct the nett value from the full freight, is not recognised by English law. The cases of *Meyer v. Dresser* (16 C. B. (N. S.) 659), *Dakin v. Ozley* (15 C. B. (N. S.) 667), and *The Salacia* (1 N. R. 195), amongst other cases, decide that under no circumstances can the shipper insist upon deducting from the full freight the value of his goods wrongfully disposed of during the voyage. He must seek his remedy for that value, as distinct from their freight, by cross-action. The third of these modes (by which

the shipper would make a deduction from the full freight of the freight of the goods improperly disposed of, but no other deduction) is permitted to the shipper if the freight is payable per tale (*The Salacia* and other cases). But this lump freight, not freight per tale. For I cannot accede to the argument that the freight is freight per tale, because 11,250*l.* freight for 3000 tons would be equivalent to the round sum of 3*l.* 15*s.* per ton, and 11,625*l.* for 3000 tons to another round sum per ton. This argument, besides being inherently weak, is based upon the assumption (which I have already declared to be without foundation) that the master covenanted absolutely to ship 3000 tons. The freight is lump freight, and it is urged on behalf of the defendant that lump freight cannot be apportioned, that deductions would be difficult if not impossible to calculate, and consequently that the only remedy open to the shipper is that of an action for damages. On the other hand, Mr. Lush argued for the defendants, that if there was any difference between lump freight and freight per tale, it was that in the case of lump freight, if any part of the cargo shipped was not brought to the port of destination, the shipowner in an action for freight could not recover any freight at all, because he would not have observed his own part of the covenant, and in favour of this proposition Mr. Lush cited the old case of *Bright v. Couper* (1 Brownlow, 21). There seems to have been no recent decision on the point, and on consulting the various text-books on the subject, I find that they all speak doubtfully as to what would be decided if a case like the present should arise (MacLachlan, 396, 397; Abbott, 356, 365, 366, 378; 1 Parsons, 245, 245, n.; Smith's Mercantile Law, 317).

The Court then must fall back upon considerations of equity. It certainly would be unjust that the master should forfeit the whole of his freight for not bringing home a small portion of his cargo; but on the other hand, it would be harsh upon the shipper that he should, in the first instance, pay full freight, though his full cargo had not been delivered, nor in ascertaining the proper amount of freight to be deducted would any such difficulty be likely to arise as would detain the master and his vessel in port. The Court, therefore, will hold that in the present case the plaintiff would have been entitled to deduct from the lump freight a sum equivalent to the freight for the goods jettisoned and sold, and then to have recovered the residue of his loss by a separate action. The exact sums will be ascertained by the Registrar and merchants.

Next, as to the plaintiff's claim for damages in respect of the goods brought to the port of destination. The defendants question his right to sue at all for damages in this respect, and they do so upon the ground that the plaintiff was never entitled to delivery, for that he never made a sufficient tender or a tender at all. The plaintiff, on the other hand, contends that he was exempted from the obligation of making

a tender, by reason of the improper conduct of the master. This conduct of the master is said to have consisted, first, in making an unjustifiable demand and insisting upon it throughout; and secondly, in withholding the necessary information.

As to the first point, the making of an exorbitant demand does not alone constitute an excuse to the plaintiff for not making a tender, but it is a very different case where the master not only makes an exorbitant demand, but persists in it, refusing to listen to any proposition to take less. I think the case cited for the plaintiff, *Kerford v. Mondel* (28 L. J. Ex. 303) is an authority for the position that, in such a state of circumstances, the owner of the goods is not bound to make a tender.

Then, as to the second point, it was strongly urged, on behalf of the defendants, that it was no part of the master's duty or contract to furnish the plaintiff with papers. But to this doctrine the Court cannot accede. Where a creditor has a lien upon a debtor's goods for an unliquidated amount—that amount being dependent upon a complicated account, the particulars of which are, at all events partly, in the possession of the creditor alone—it seems only common sense that the creditor cannot be justified in enforcing his demand unless he has communicated to the debtor full information; and by full information I mean, not merely the statement of the total amount claimed, but a detailed account, and a production of all papers in his possession, necessary to enable the debtor to verify the account, and satisfy himself that the sum claimed is justly due. I see no reason why this rule should not apply to a master of a vessel, in his relation to the owner of goods on board that vessel. Nor do I think that in the present case this duty was the less incumbent upon the master of "The Norway," because Ashburner, as representative of his firm, was aware of some of the advances made to the shipowner, and which were to be deducted from the freight. That was an accidental circumstance. Besides, the particulars, of which Ashburner was in possession, were neither complete nor undisputed. If, therefore, the master failed to furnish to the plaintiff the papers necessary to enable him to ascertain the extent of the defendants' lien, and damage arose to the plaintiff therefrom, I shall hold that the master was guilty of "a breach of duty," within the terms of the 6th section of the Admiralty Court Act, 1861, and also that, in consequence, the plaintiff cannot be precluded in this cause from not having made a sufficient tender. For how could he make a sufficient tender, if he had not the means of knowing what was a sufficient tender? To use the words of Lord Denman, in the case of *Ashmole v. Wainwright*, (2 Ad. & E. (N. S.) 215), "It is said that the plaintiff (who was the owner of the goods) ought to have tendered the proper charges: the answer is, that the defendants (who were the carriers) ought to have told him the proper charges."

In the present case there is great conflict of testimony as to whether the papers were produced, and, therefore, the only course, after considering the probabilities of the case, is to determine on whom lies the *onus probandi*, and if the party on whom the onus lies leaves the case in doubt, the decision must be against that party. In this case I deem it clear that the burden of proof lies upon the master: and the only result at which the Court can arrive is, that it is not established to the satisfaction of the Court that the master fulfilled his duty by producing the requisite information.

On these two grounds, then—first, that the master having made an excessive demand for freight, persisted in it, and refused to entertain the idea of reduction; and, secondly, that he withheld from the plaintiff the papers necessary to show what was the amount of freight and general average due—I shall hold that the plaintiff, if he did not make a sufficient legal tender, was not thereby disqualified from prosecuting his claim for damages for non-delivery of his cargo.

He claims damages on three grounds, viz.:—1st. For not discharging into one of the three closed docks—Stanley, Wapping, or Albert. 2nd. For improperly handling the cargo in not separating the damaged rice from the sound. 3rd. For non-assortment of the cargo.

As to the first count, Mr. Lush cited the 67th section of the Merchant Shipping Amendment Act, 1862, paragraph 3, which directs that if any wharf or warehouse is named in the charter-party or bill of lading, the shipowner shall land the goods at that wharf or warehouse; and argued that the bill of lading, in stating that "The Norway" was bound to Cowes for orders, as per charter-party, rendered it incumbent upon the master to obey the orders of De Mattos to discharge the cargo at one of the three named closed docks. But on reference to the charter, it appears that the orders there mentioned were orders to proceed to London, Liverpool, Bordeaux, &c., that is, to specified ports, but not to any particular dock in those ports. This argument, therefore, cannot, I think, be maintained.

Reference also was made by Mr. Lush to the 67th section of the Merchant Shipping Amendment Act, 1862, par. 4, which provides that the shipowner in landing goods in virtue of that enactment, shall place them in or on some wharf or warehouse on or in which goods of a like nature are usually placed; and it was contended that the Canada Wharf was not such a place as contemplated by the section. I think, however, that the evidence before me shows that rice is not unfrequently landed in the open as well as the closed docks.

Mr. Lush then argued that, irrespective of any statutory obligation or any express contract, the master being bound to deliver to the owner of the goods, was bound to deliver at the dock named by that owner. But on this point I think the law is

correctly represented in the following observation of Mr. Parsons, in his treatise on Maritime Law, vol. i. p. 152 :—"The general rule, applicable to carriers and other persons contracting to deliver goods, is, that a personal delivery is necessary. But this rule does not apply to the case of ships, the usages of trade having constituted a delivery on the wharf, with notice to the consignee, sufficient."

The Court would be reluctant in any way to diminish the responsibility of masters of vessels to attend to the instructions given to them by the owners of the goods on board those vessels; but, in the present case, looking to the absence of any provision in the bill of lading that the goods should be delivered in any particular dock; to the difficulty and even danger of taking "The Norway" into the Stanley or Wapping Dock; to the attempt of the master to take her into the Stanley Dock; and lastly, to the fact that the goods might have been as well handled in the Canada Dock as in one of the closed docks, I shall hold that the plaintiff is not entitled to any damages for the discharge of the cargo in the Canada Dock.

As to the second point,—the claim to damages for not separating the unsound from the sound rice,—in the conflict of testimony, I must hold that the plaintiff has failed to prove that, in this respect, the cargo was improperly handled.

As to the third point, the claim for damages for non-assortment. That the cargo was not assorted, and thereby its sale was prejudiced, is admitted. The question is, whether the defendant was bound to assort? Mr. Brett relied upon two statutes, as constituting a valid defence. He cited the 35th section of the Mersey Docks Consolidation Act, 1858: "The cargo of any vessel, from any foreign or colonial port, entering and using any open dock, shall be *received, weighed, and loaded off* by one set of porters only, who shall be in the employ and under the direction and orders of one of the master-porters appointed by the Board," as showing that the duty of the master-porter was limited to receiving, weighing, and loading off (which in this case was done); and that he is not bound to assort, unless specially required and paid extra for the work. He cited also the evidence of Messrs. Taylor as going to the same effect.

Mr. Brett also cited the sixth paragraph of the 67th section of the Merchant Shipping Amendment Act:—"If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment, and the expense of and consequent upon such landing and assortment shall be borne by the shipowner," and his argument was that entry by the

owner of the goods, and an offer to take delivery and to convey the goods to some other warehouse, was a condition precedent to assortment; and that in this case the owner had not made entry, and therefore that the duty to assort never arose. It is true that as a fact Ashburner did not make entry, but in my mind the evidence establishes that this was occasioned by the wrongful act of the master. The master enforced his lien for an excessive sum, and at the same time withheld the papers necessary to enable the plaintiff to ascertain what was a sufficient tender. This being so, I must hold that the plaintiff, having been wrongfully prevented by the master from making entry, must, as regards the defendants, be in as good a position as if he actually had made entry. The master had received express notice from the plaintiff to have the rice assorted, and, irrespective of that, he was bound to take as good care of the cargo as a prudent owner would have taken; and it appears in evidence that it is the custom to assort Rangoon rice, and that the cargo was depreciated from not having been assorted. I think, therefore, that the plaintiff is entitled to damages for the non-assortment of his cargo.

Then Mr. Brett contended that even if the assortment of the cargo had been improperly omitted, the remedy of the owner of the goods would be against the master-porter personally, and not against the shipowner. No doubt this would usually be the case, because usually the master-porter is employed by the consignee of the cargo; but in the present instance the master-porter was employed by the master of the vessel. I shall hold that the defendants were bound to have assorted the cargo, and that whether the non-assortment arose either from their neglect to give the order, or from the act of their agent in not doing it, they are equally responsible. The amount of the damages thus incurred will be estimated by the Registrar and merchants.

Lastly, the plaintiff claims damages for non-delivery of the rice. As in the result the market did not fall, and the sale consequently was not injured by postponement, the only way in which the plaintiff could be damaged by non-delivery is in loss of interest. He might have realised his cargo in December: as it was, he did not do so till April or May, and meantime his capital, to the extent of the value of the cargo, was locked up. It is for the loss of interest upon this principal for this period that the plaintiff claims damages. I think the plaintiff is entitled to be recouped this loss. If, indeed, he might have saved part of this loss, and by culpable neglect did not do so, then to the extent of the consequences of his neglect he could not have recovered from the defendants. But I think the plaintiff was not bound to avail himself of the means provided by the Merchant Shipping Amendment Act, 1862 (sec. 70, 71), to obtain possession of his cargo; for that would have involved his depositing with the wharfinger the full sum claimed by the master, and this was an exorbitant sum. Such course

was not imperative upon the plaintiff. I shall, therefore, refer it to the Registrar and merchants to estimate this interest.

It will be convenient that I should sum up the results of this judgment. I shall endeavour to do full justice in the case, and to effect a complete adjustment of all outstanding claims between the parties. On the one hand, I shall hold that the master had a lien upon the cargo for freight and general average. The freight will be the sum contracted for by the charter-party, 11,250*l.*, less the following deductions:—1st, the advances; 2nd, the commissions, interest, and insurance; 3rd, the proportion of freight forfeited for breach of the guarantee; 4th, the proportion of freight that would have been payable in respect of the cargo jettisoned, and in respect of that sold at the Mauritius, if they had been brought to their destination. I shall refer it to the Registrar and merchants to take an account thereof, and to ascertain the nett freight due, on the principles stated in my judgment, taking into consideration the

amount which has been paid on account of freight by the plaintiff during the progress of this cause, and the period at which it was paid. I shall also refer it to the Registrar and merchants to ascertain the amount (if any) due from the owner of the cargo in respect of general average. On the other hand, I shall hold that the plaintiff, under the provisions of the Admiralty Court Act, 1861, is entitled to damages in respect of—1st, the goods jettisoned; 2nd, the goods sold at the Mauritius; 3rd, the non-assortment of the cargo at Liverpool; 4th, the loss of interest occasioned by the wrongful withholding of the cargo.

I shall direct the Registrar, with the assistance of the merchants, to assess these damages; and, having done so, to take an account between the parties, and to ascertain the balance (if any) due, and to which of them. They will also report to the Court as to whether interest is properly due on this balance, and for what period.

The plaintiff must have the costs of this suit.

EQUITY.

Lord Chancellor. } THOMAS v. CROSS.
2 DEC. 1864.

Practice — Solicitor and Client — Security for Costs — Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 37.

The client of a solicitor gave him a mortgage to secure previous advances and costs. Having subsequently discharged him from being his solicitor, he obtained an order at the Rolls for delivery and taxation of his bill of costs, whereby the solicitor was prohibited from commencing any suit in respect of the bill pending the reference; but he did not serve it properly on the solicitor, and took no steps to enforce it. Upwards of six months after the order was obtained, the solicitor filed a bill to enforce his security:—

Held, that the order was no bar to the suit.

A suit to foreclose the equity of redemption in property mortgaged to secure costs is not a suit "for the recovery of fees," within the meaning of the 37th section of the Attorneys and Solicitors Act: and a solicitor is not thereby debarred from commencing such a suit, though he has not delivered his bill of costs: nor will the proceedings be stayed till the requisites of the Act be complied with, in a case where there are subsequent incumbrancers.

Waugh v. Waddell, 16 Beav. 521, commented on.

In February, 1861, James Cross, the principal defendant in this suit, mortgaged certain property to the plaintiff, who was then acting as his solicitor in various actions and suits, to secure the payment of sums due to the plaintiff in respect of previous advances and costs: and also to secure future advances and costs.

In December, 1861, Cross discharged the plaintiff from being his solicitor; and, on the 26th of December, obtained the usual order at the Rolls for the delivery and taxation of the plaintiff's bill of costs, whereby it was ordered that no proceedings at law or otherwise should be commenced against Cross in respect of such bill pending the reference.

Cross, in his answer, stated that this order was duly served on the plaintiff, and the latter did not contradict the statement; but it was admitted at the bar that, in fact, the order was merely left at the plaintiff's office, and was not served on him personally. No steps were taken under the order either by the plaintiff or Cross previous to the original hearing of the suit.

In October, 1862, the plaintiff filed the bill in this suit against Cross and certain subsequent incum-

brancers on the mortgaged property, praying for foreclosure on non-payment by Cross of the advances made to him by the plaintiff, and the costs due at the date of the mortgage.

At the hearing, Vice-Chancellor Kindersley made a decree for foreclosure limited to the advances made by the plaintiff, being of opinion, on the authority of *Waugh v. Waddell* (16 Beav. 521), that the plaintiff could not file a bill to enforce a security for costs while the order of the 26th of December, 1861, was pending.

Subsequently to this decree the order of the 26th of December, 1861, was discharged; and the plaintiff now appealed against the decree of the Vice-Chancellor.

Glaspe, Q.C., and W. H. Terrell, for the plaintiff.

The decree ought to have extended to the costs due to the plaintiff at the date of the mortgage. The order of the 26th of December was clearly irregular; and further the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), under which it was made, was not intended to interfere with a security given for costs.

Osborne, Q.C., and Shebbeare, for the defendant Cross; Bailly, Q.C., and D. Jones, and Craig, Q.C., and Eddis, for subsequent incumbrancers.

1st. The plaintiff had no right to file his bill pending the order of the 26th of December, 1861,

Waugh v. Waddell (loc. cit.)

It is immaterial that the order was not served on the plaintiff personally; for it is not denied that he had notice of it; and, the order being in the nature of an injunction, this is sufficient.

2nd. Even if the order of the 26th December, 1861, had never been made, the plaintiff had no right to commence these proceedings, for it is enacted by section 37 of the Attorneys and Solicitors Act, that no solicitor "shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements," for business done by such solicitor, until the expiration of one calendar month after the delivery of his bill of costs. Now this is a suit "for the recovery of fees." In the latter part of section 37, it is directed that, pending a reference for taxation, the Court shall restrain such solicitor from commencing any action or suit "touching such demand"; this is clearly a suit touching the demand, and the words in the earlier part of the section ought to be construed with regard to those in the latter, for if the Legislature considered the commencement of a suit to recover fees pending a reference for taxation to be

mischievous, *a fortiori* must it be mischievous to commence such a suit before a bill of costs is delivered.

Glassey, Q.C., was called on to reply, only as to the question whether this was a suit for the recovery of fees. He cited,

Jeffreys v. Evans, 14 M. & W. 210 ; where the Act was held to be no bar to an action on a promissory note given on account of fees.

Shebbeare, in reference to *Jeffreys v. Evans* (*loc. cit.*), observed, that there the action was brought for a definite sum, admitted by the client to be due ; here no definite sum was claimed, and no account had been rendered.

THE LORD CHANCELLOR said, that the order of the 26th of December was obtained *ex parte* ; it had not been properly served on the plaintiff ; nor had the defendant thought it worth while to take any proceedings on it previous to the filing of the bill, upwards of six months after it was obtained. The Vice-Chancellor could not be right in making a decree which, in effect, annulled the plaintiff's security for costs, merely on the ground of the existence of an order which was manifestly irregular, and which had been abandoned by the party obtaining it. Since the decree, the order in question had been discharged. This was, however, immaterial : for had it still existed, he should not have regarded it ; nor should he have considered the plaintiff as bound by it, inasmuch as it had not been legally brought to his notice.

It was then said, that the plaintiff was prohibited, by the Attorneys and Solicitors Act, from commencing his suit, until the expiration of a month after the delivery of his bill of costs. But that Act was confined to suits founded on the implied contract arising out of the relation of solicitor and client ; and where another contract existed, into which the client need not have entered until he had ascertained the amount of his costs, the Act did not prohibit a suit to enforce that other contract, arising, no doubt, out of the original implied contract, but still being a distinct and collateral engagement. This was judicially determined in *Jeffreys v. Evans* (*loc. cit.*), the principle of which was applicable to the present case. It was true, that a decree for foreclosure might, indirectly, compel payment of the costs ; but, in terms, it merely gave the plaintiff the benefit of his security, if payment were not made. The Act, therefore, was no bar to the suit, nor would it answer any useful purpose to stay proceedings till the requisitions of the Act were complied with : for the subsequent incumbrancers would not be bound by any order made under section 37 of the Attorneys and Solicitors Act, which was only available between solicitor and client.

His attention had been called to the case of *Waugh v. Waddell* (*loc. cit.*). There, the only parties were the solicitor and his client, who was a married woman.

The question there arose, whether a married woman was within the Act ? The Master of the Rolls decided that she was a "party chargeable" with a bill of costs (section 37 of Act) ; but held, that, as the matter concerned only the solicitor and his client, the subsequent words of section 37 applied, and the suit ought not to have been instituted. On this decision, he expressed no opinion ; but he did not understand the latter part of the judgment, in which his Honour, while appearing to admit that the solicitor ought not to be prevented from realising his security, dismissed the claim, because it went beyond that. In what respect the claim went beyond the realisation of the security, did not clearly appear from the report ; but the circumstances of the present case were different : the order of reference to taxation was a nonentity, and ought not to have entered as an element of judicial consideration.

The decree of the Vice-Chancellor must be varied, by directing an account of the costs due to the plaintiff at the date of the mortgage, and granting the proper relief, consequent on the taking of the account.

Lord Chancellor.

11, 12, 14 Nov.,

5 DEC. 1864.

SICHEL v. RAPHAEL.

Equitable Assignment.

B, being indebted to A, in respect of certain bills of exchange, drawn upon and accepted by B and indorsed to A, applied to C to lend him the money to meet his acceptances. C lent the money, which was paid to A. At the time of such payment, A knew that C had lent the money upon an agreement that a mortgage security held by A upon trust, in the event which had happened, for B, should be transferred to C:—

Semble, that under these circumstances, a letter from B, calling upon A to transfer the security to C, was a good equitable assignment thereof.

This was an appeal by the plaintiffs from so much of a decree of his Honour Vice-Chancellor Wood, as dismissed the bill, with costs, against the defendants, the Chartered Mercantile Bank of India.

For the report of the case before the Court below, see 3 N. R. 662.

Sir H. Cairns, Q.C., and *Jones Bateman*, for the plaintiffs.

The letter of the 10th of November, 1860, was an equitable assignment of the contract created by the deed of covenant of the 19th of June, 1860, and not a mere revocable mandate,

Collyer v. Fallon, Turn. & R. 459 ;

Jones v. Farrell, 1 De G. & J. 208 ;

Ex parte South, Re Row, 3 Swans. 392 ;

Williams v. Everitt, 14 East, 583 ;

Gibson v. Minet, 9 Moo. C. B. 31.

They also referred to, and commented on,

Garrard v. Lord Lauderdale, 3 Sim. 1 ;

Wakoya v. Coutts, 3 Mer. 707; s. c. 3 Sim. 14;
Scott v. Porcher, 3 Mer. 632.

Roll, Q.C., and *Bowring*, argued, *contra*.

James Bateman, in reply.

5 DEC. 1864.

THE LORD CHANCELLOR said: By a bond or instrument of hypothecation, dated the 3rd day of May, 1860, and executed, attested, and registered in conformity with the law of Ceylon, certain coffee estates in that island were mortgaged, by their owner, a Mr. Heale, to the Chartered Mercantile Bank, to secure the due payment, at maturity, of bills of exchange for sums amounting to 5000*l.*, drawn by Heale on, and accepted by, a firm of Raphael, Gardiner & Co., who were merchants in London, and at Colombo, in Ceylon, and which bills had been discounted and were held by the bank. The bond or mortgage, together with the title-deeds of the estates, were left in the custody of the manager of the bank at Colombo. Some of the estates were subject to prior charges.

By another mortgage, dated the 8th of June, 1860, and which was also duly executed, attested, and registered according to the law of Ceylon, the same estates were conveyed by Mr. Heale to Raphael, Gardiner & Co., subject to the mortgage to the bank, and also to the former charges, as a security for all moneys advanced and paid by Raphael & Co. to or for Heale, and for all bills of exchange that had been, or should be drawn by Heale upon, and accepted and paid by, Raphael & Co., and for all other loans, discounts, credits, advances, and payments of any and every description by Raphael & Co. to or for the accommodation, or at the request, of Heale.

By a deed poll under the seal of the Chartered Mercantile Bank, dated the 19th of June, 1860, after reciting the mortgage to the bank, and also reciting that it was agreed at the time of the giving such security, that on payment of the bills (meaning the acceptances for 5000*l.*), the Chartered Bank should hold the bonds and mortgage at the disposal, and for the benefit of Raphael and Gardiner, and further reciting that Raphael and Gardiner had undertaken to pay the bills at maturity, and had requested the bank to transfer the bond to them on payment of the bills, it was witnessed that the Chartered Bank did thereby covenant on payment of the bills at maturity to assign and transfer to Raphael and Gardiner, their heirs, executors, administrators, and assigns, the bond of the 3rd day of May, 1860, and all the right, title, and interest of the bank therein and thereto, and to the debts thereby intended to be secured.

He thought it was proved by the evidence, that the instrument of the 19th of June, 1860, was not executed and attested in such manner as the law of Ceylon required, in order to make it effectual as a transfer of the mortgage.

It was, therefore, a personal contract, and according to the law of England, as administered in this Court, amounted to a declaration of trust by the bank of the mortgage securities, in favour of Messrs. Raphael and Gardiner in the event of their paying the bills of exchange.

When the bills for 5000*l.* approached maturity, Raphael & Co. applied to the plaintiffs for a loan of money to take them up, and the necessary sums for that purpose were advanced and lent by the plaintiffs to Raphael & Co., and were paid to the bankers of the last-mentioned firm, to the credit of their account, and the bills of exchange for 5000*l.* were then paid by Raphael & Co.

This advance was made by the plaintiffs to Raphael & Co., on the terms and agreement that the bond or mortgage of the 3rd of May, 1860, for securing the bills of exchange, should be transferred by the Chartered Bank to the plaintiffs; and, accordingly, Mr. Gardiner, who was in London (his partner, Mr. Raphael, having previously left England for Ceylon), sent a letter, dated the 10th of November, 1860, signed for himself and Raphael to the Chartered Bank, in which, after referring to the deed of covenant, dated the 19th of June, 1860, and to the fact that they had paid the bills for 5000*l.*, Raphael and Gardiner called on the Chartered Bank to assign and transfer to the plaintiffs, the bond of the 3rd of May, 1860, for 5000*l.*, and all securities held by the bank for securing payment of the bills for 5000*l.*, and the estates comprised in such securities.

By their answer to that letter, dated the 16th of November, 1860, the Chartered Bank informed Raphael and Gardiner that they had forwarded a copy of the letter of the 10th inst. to their manager at Colombo, to deal with the matters therein referred to, and had at the same time informed him of the payment of all Heale's drafts on Raphael and Gardiner, held by the Chartered Bank in London. There had been much argument at the Bar on the effect of this letter of the 10th of November, 1860. By the plaintiffs it was contended that it amounted in Equity to a transfer to the plaintiffs of the trust in effect declared by the Chartered Bank in favour of Raphael and Gardiner, and which was to become operative in the event of their payment of the mortgage debt of 5000*l.* By the defendants it was contended that the letter amounted merely to a mandate or direction, which was revocable, and did not constitute an assignment. Having regard to the facts, partly proved and partly admitted, that the Chartered Bank knew at the time of payment that the plaintiffs had lent Raphael and Gardiner the money with which to take up the bills, upon an agreement that the mortgage security should be transferred to the plaintiffs, he was of opinion that, according to the principles of this Court, this letter of the 10th of November constituted a valid assignment in Equity to the plaintiffs of that contract or trust to transfer the mortgage security which was created or declared by the bank by the deed of the

19th of June, 1860, and which arose on payment of the bills of exchange.

But although this would be the result of the rules of jurisprudence acknowledged here, yet, upon an examination of the evidence as to the law of Ceylon, he was satisfied that neither the instrument of June, 1860, nor the letter of the 10th of November, 1860, nor the payment of the bills of exchange, would be considered by that law as constituting the plaintiffs assignees of the mortgage to the bank, or as giving them any right to, or interest in, the security or the estates comprised in it.

On the intelligence arriving at Ceylon of the payment of the bills for 5000*l.*, Mr. Raphael, who was then in the island, demanded from the manager of the bank possession of the bond or mortgage of the 3rd of May, 1860, and also the title-deeds of the estates.

He made this demand on behalf of himself and his partner Gardiner, as being the next registered incumbrancer after the mortgage to the bank, which last mortgage Raphael insisted had been satisfied, and was extinct by payment of the bills of exchange, and that no valid transfer thereof had been or could be made in conformity with the law of the colony.

Raphael, therefore, claimed the possession of the satisfied mortgage bond and the title-deeds as things incidental to, or attendant on, the ownership of the estates, and therefore belonging to the next registered owner.

Although Raphael thus acted in violation of the personal contract made with the plaintiffs by himself and Gardiner, yet his demand appeared to his Lordship, from the evidence, to have been strictly in accordance with the law of real property in Ceylon, and that it could not have been resisted by the manager of the bank on the ground of any better right or title in the plaintiffs.

In fact, however, the demand of Raphael was resisted by the manager of the bank, until he was advised, by counsel at Colombo, that as the bills mentioned in the bond or mortgage had all been paid, and the instrument of the 19th of June, 1860, had not been notorially executed, he would have by the law of Ceylon, no defence to the action which was threatened by Raphael. The bond, together with the title-deeds, was accordingly delivered over by the manager to Mr. Raphael.

It was on this transaction that the demand of the plaintiffs against the bank in their present suit was founded.

The charge in the bill was, that under the circumstances aforesaid, and by the acceptance of the notice of the 10th of November, 1860, the bank became trustees of the said mortgage security and title-deeds for the plaintiffs, and were bound not to part with the same except to the plaintiffs, or under their directions. But to this it was answered, and he thought proved by the bank, that the mortgage security and title-deeds were taken from them by a stronger and better title than that of the plaintiffs, and that that they

did not assign and deliver the security and deeds of their own accord, but were compelled by law to do what they have done. If so, there was no breach of trust or contract, and the fault lay at the door of the plaintiffs, who neglected to take that perfect legal transfer of the mortgage which would have been recognised by the law of Ceylon, and enabled the bank to resist Raphael's demand.

With respect to the charge introduced by amendment into the bill, to the effect that the bank assigned the security and deeds to Raphael, for the express purpose of enabling him to create the several mortgages which were stated, and with full knowledge of the use he intended to make of the security and deeds, his Lordship was of opinion that there was no foundation whatever for any such charge, and that it was wholly unwarranted.

The case against the bank entirely failed, and the bill had been rightly dismissed as against them with costs. The appeal would also be dismissed with costs.

Master of the Rolls. } JOFF v. WOOD.
5 Nov. 2 Dec. 1864. } Re SMITH.

Domicil—Change of Domicil—Foreign Residence—Intention to Return.

Residence abroad for the purposes of trade does not, per se, constitute a change of domicil. To constitute such a change, there must be an animus manendi.

A trader going to India with the intention of returning at some indefinite time does not acquire an Indian domicil, although he may never return.

J S, a Scottish trader, went to India in 1805, and, with the exception of a visit to Scotland in 1819, remained in India till his death, in 1830 :—

Held, under the circumstances, that J S did not acquire an Indian domicil.

Allardice v. Onalow (10 Jur. (N. S.) 352) not followed.

Lord v. Colvin (4 Drew. 366), and Moorhouse v. Lord (1 N. R. 555), commented upon.

This was a rehearing of the petition presented in this cause by Elizabeth Smith, an order for the purpose having been obtained; see *Joff v. Wood*, 3 N. R. 404.

The question was, as to the domicil of the infants, Eleanor and Mungo Smith: their domicil depended upon that of their father, John Smith.

John Smith was born in Scotland in 1786, and up to 1805 his domicil was the domicil of his origin,—namely, a Scotch domicil. In 1805 he went to India, and was engaged as a clerk in the banking firm of Fergusson & Co., at Calcutta. In 1807 he left his employment, and became an indigo planter. In 1814 he returned to the bank, and became a partner in the firm of Fergusson & Co. In January, 1816, at Calcutta, he married Eleanor Gale, his wife. On the 11th of November, 1817, Eleanor, his eldest child, was

born, and she died on the 13th of July, 1818. In July, 1819, he visited Scotland with his wife, and while there, in October, 1819, he executed a bond, in which he described himself "as of Calcutta, and presently residing in Ayr," and in December, 1819, he made a testamentary disposition of his property, in which he described himself in like manner "as of Calcutta, and presently residing in Ayr." He said, in this instrument, "in case I should happen to die abroad, I direct my trustees to pay the expenses of my dear wife to this country." In 1819, also, he obtained plans for the improvement of his house at Drongan, in Ayrshire, which was the old family mansion, and in 1820 was enrolled as a freeholder in Ayrshire. In October, 1820, he returned to Calcutta. On the 23rd of August, 1823, his second child, Mungo Smith, was born, who died on the 3rd of August, 1824. In 1825, his wife set out on her return to England. She died on her voyage, in May of that year, near the Mauritius, and in the same year he erected a monument to his wife in Calcutta. A few years before his death he sent some wine to Drongan for his own consumption, and on the 3rd of December, 1830, he died at Calcutta.

These were the facts of the case, so far as they related to the movements and overt acts of John Smith. As to his intention to make India his home, a good deal of evidence was put in, consisting of letters. The first of these was written by him in the year 1814; the others were written by him between the years 1819 and 1830. In these letters occur several expressions indicative of his intention to return to Scotland.

Hobhouse, Q.C., and *H. M. Jackson*, for the petition, contended that, an Indian domicile was acquired by John Smith previously to his return from India in 1819. When the question of domicile was before the Court on the previous occasion, the attention of the Court was not called to the difference of the case before, and after the year 1819. Every person who went to India, intended to return, and yet it had been held that those who went there in the service of the East India Company, acquired an Indian domicile,

Bruce v. Bruce, 2 B. & P. 229 n.;

Munroe v. Douglas, 5 Madd. 379;

Forbes v. Forbes, Kay, 341;

Lord v. Colvin, 4 Drew. 366;

Moorhouse v. Lord, 10 H. of L. Ca. 272; s. c. 1 N. R. 555*.

To the case of a person going to India for the purposes of trade, the same principle must be applied,

Cockrell v. Cockrell, 4 W. R. 730;

Attorney-General v. Fitzgerald, 3 Drew. 610;

Allardice v. Onslow, 10 Jur. (N. S.) 352.

It was less difficult for a Scotchman to acquire an Indian domicile than it was for a Frenchman; in the case of the Scotchman there would be no change of his allegiance.

A domicile could only be changed by intention and act, intention alone was insufficient,

Drevon v. Drevon, 4 N. R. 316;

In the Goods of Raffetel, 3 Sw. & Tr. 49;

Maxwell v. McClure, 6 JIL (N. S.) 407;

Attorney-General v. Dunn, 6 M. & W. 611.

If, therefore, an Anglo-Indian domicile had once been acquired by John Smith, it could not be afterwards divested by any intention to return, which was not carried into effect.

In about three years after the death of John Smith, the mercantile firm of which he was a member, became bankrupt. John Smith was acquainted with the critical state of his partnership affairs, and was aware that any intention, which he might express of being able to return home, could not in fact be carried out, and many of the expressions in his letters relied upon as showing an intention to return home, were made use of by him merely as expressing an ultimate hope. They also cited,

Wicker v. Hume, 7 H. of L. Ca. 124.

Selwyn, Q.C., *Serj. Atkinson*, and *B. L. Chapman*, against the petition, contended, that John Smith never lost his domicile of origin.

In order to lose a domicile of origin, and to acquire a new domicile, a man must intend *exuere patriam*, and change of residence alone did not effect a change of domicile,

Moorhouse v. Lord (*loc. cit.*).

It was a question of fact in every case—was it the man's intention to change his domicile?

It had been said, that an officer going to India in the service of the East India Company, acquired a domicile there; but there could be no analogy between such a case and the present, which was that of a merchant going to India for private speculation, and being under no obligation to remain there,

Forbes v. Forbes (*loc. cit.*).

Hanson, for the Crown, opposed the petition. He argued, that it was not enough to show that John Smith had gone to India, without showing that he intended to abandon his Scotch domicile,

Hodgson v. De Beaucheme, 12 Moo. P. C. C. 285;

Re Capdevielle, 5 N. R. 15;

Aikman v. Aikman, 3 Macq. 854.

Hobhouse, Q.C., in reply, contended, that John Smith's intention to change his country amounted to a change of domicile. A floating intention to return had never been held to be sufficient to prevent the acquisition of an Indian domicile, in such a case as the present.

THE MASTER OF THE ROLLS said: He was of opinion that the domicile of the two infant children was Scotch. It was quite settled that two things were necessary to constitute a change of domicile: first the *factum* of the change of residence; and, secondly, the *animus*

manendi; in other words, in order to effect a change of domicile, the person must have settled in a residence out of the former domicile, whether it were the domicile of origin, or an acquired domicile, and he must also have the intention of making that residence his permanent home. If John Smith had ever acquired an Indian domicile it was clear that he never lost it, for the *factum* of a subsequent change of residence never existed.

The real question before his Honour was, whether John Smith ever acquired an Indian domicile. This was certain, that in 1805 he went to reside in India, and that he continued to reside there until his death in 1830, with the exception of about a year that he spent in Scotland. There was the *factum* of an Indian residence. If, therefore, the father of the infants had the intention of making India his home, he acquired an Indian domicile. Upon this point the evidence amounted to this, that up to 1814 there was no expression of the intention of John Smith either way, and that after 1814 there was a strongly expressed intention on his part of returning to Scotland. To state it in another form, for the first nine years of his residence in India there was nothing except the facts of the case to disclose his intention, and those amounted to nothing, and for the last sixteen years of his residence in India his intention of returning to Scotland was clearly expressed. His Honour was of opinion that the facts of the case and the acts done by John Smith during the first nine years of his residence in India did not show an intention to reside there permanently, and the fair and reasonable inference from the letters written by him during the last sixteen years of his residence in India was, that his intention during the first nine years of his residence there were the same as those he entertained during the last sixteen years of his life. Unless, therefore, there was an irresistible inference to be drawn from the fact of his residence in India, coupled with his occupation there, which gave him an Indian domicile, in the opinion of his Honour, he had never lost his domicile of origin, but he remained a domiciled Scotchman during the whole time of his residence in India. Although the Vice-Chancellor Kindersley, in the case of *Allartice v. Onslow* (*loc. cit.*), stated that he held, and that the House of Lords also held, in the case of *Lord v. Colvin* (*loc. cit.*), that Dr. Cochrane had acquired an Indian domicile, notwithstanding his correspondence showed an intention during the whole of that period to return to Scotland, his Honour did not find, on reading over carefully the judgment given by the Vice-Chancellor himself, that that question was in fact raised before him or determined by him, or that it was argued before or determined by the House of Lords. It seemed to his Honour to have been decided in that case that, assuming Dr. Cochrane's domicile was Indian, he had regained his Scotch domicile by his return to Scotland and his residence at *Clippens in Renfrewshire*, and although he left after-

wards and went to reside in Switzerland and France, where he ultimately died, he had not lost his re-acquired Scotch domicile.

His Honour then adverted to the rule laid down in *Bruce v. Bruce* (*loc. cit.*), and followed in *Munroe v. Douglas* (*loc. cit.*), that a residence in India, for the purpose of following a profession there in the service of the East India Company, created a new domicile, and his Honour observed that the ground of that rule, as explained in the case of *Forbes v. Forbes* (*loc. cit.*), was that the law, from the circumstances of the case, presumed that the party had an intention to remain in India, because such an intention was consistent with his duty. He had not found any case in which this doctrine had been extended to a person who became a servant in a private establishment abroad, or who went abroad for the purpose of acquiring a fortune, with the intention of returning at some indefinite period, when his object should be attained. If so, any merchant who went from this country, and settled in any foreign country, in order, for instance, to correspond with a London or Liverpool house, and to do this until he had acquired a sufficient fortune to enable him to live comfortably at home, would acquire a domicile there, notwithstanding the repeated expressions of his intention not to remain in that country, but to return as soon as he could. Assuming that one essential ingredient in a change of domicile was, to use the expression of Lord Cranworth, "*exuere patriam*," or, in other words, the intention of making the foreign residence a home, which was the expression of Mr. Justice Story, it was a very strong thing that the law should draw an irresistible inference that a man entertained such an intention, from the fact that he ought to have entertained it by reason of the duties he had to perform, and that it should not merely draw this inference of intention, but that the inference itself should be incapable of being rebutted by the strongest evidence of a contrary intention. This, however, was settled by the cases referred to; but he doubted whether such inference could fairly be presumed or drawn from the case of a man who went abroad to acquire a fortune in the best way he could, or to make this inference so overwhelming as to control and override the strongest expressions of a contrary intention. It was clear that if it applied to India, it must apply to France, or Italy, and every foreign country. There could not be one law upon this subject as regarded India, and another law as regarded the rest of the world. He must regard this exactly as he should have done if the residence and acts of John Smith had been at Bordeaux or Constantinople, instead of being at Calcutta.

He considered the cases referred to had settled the rule as to officers and covenanted servants of the East India Company resident in India; but he considered that to be the exception, and as, in this case, he found that John Smith always intended to return to Scot-

land, and never intended to make India his home, he was of opinion that John Smith's residence in India, from 1805 to 1830, did not give him an Indian domicile, and that he never lost his domicile of origin, which was Scotch, and he retained the opinion he had before expressed upon this subject when the petition first came before him.

Minute.—The Court being of opinion that the domicile of the two infant children of John Smith was a Scotch domicile, dismiss the petition of rehearing, with costs.

Note.—See

Re Domingo Capdevielle, 4 N. R. 15 ;

Attorney-General v. Madeline Countess Blücher de Wahlstatt, 5 N. R. 135.

Master of the Rolls. } ROBSON v. FLIGHT.
7, 11 Nov., 3 Dec. 1864. }

*Trustee—Heir-at-Law—Imperative Power—
Lease—Purchase for Valuable Consideration
without Notice.*

If, on the failure of the donees of a power, which is auxiliary to a trust, an unauthorised person executes the power in a proper manner, the execution will be upheld by the Court.

A testator having settled real estate, the legal estate of which was outstanding, directed that his trustees should and might grant leases of the settled property. The trustees having failed, the heir-at-law, who was also tenant for life of a moiety, granted a lease:—

Held, that as the power to lease was auxiliary to the trust, the lease was binding on the remaindermen:

Held, also, that the words "shall and may," made the power imperative.

The lease had been purchased under the usual condition, not to inquire into the lessor's title:—

Held, that the purchaser could not on that ground maintain the defence of purchase for valuable consideration without notice.

This was a motion for decree, in a suit to establish the invalidity of a lease.

John Hall, by his will, devised all his real estate to E. Stanger, and J. Harrison, upon trust, as to the house, No. 45, Ludgate-hill, to pay one moiety of the rents thereof to his son John E. Hall, during his life, with remainder to the children of John E. Hall, and to pay the other moiety to his daughter Eliza Hall, during her life, with remainder to her children. The will contained the following clause:—"And I hereby declare and direct, that from and after" any person entitled for life under my will to any estate for life, shall have attained the age of twenty-one years, "then all, or any part or parts of the said real estate to which he, she, or they, shall for the time being be entitled as aforesaid, shall and may with his, her, or their consent in writing, and subject to any lease or leases

which may have been previously made under or by virtue of this my will, be leased or demised by the said E. Stanger and J. Harrison, and the survivor of them; and the executors, or administrators of such survivor, at rack-rent, for any term of years in possession not exceeding the term of twenty-one years." This clause was immediately preceded by an exactly similar clause, providing for leases during the minority of the persons entitled. The power of appointing new trustees was given to the surviving trustee or his executors, and no deed or formalities were prescribed for such appointment.

John Hall died in May, 1826, leaving his son and daughter infants. In consequence of the death of one trustee, and the disclaimer of the other, neither of the trustees had ever acted in the will, and there had never been any formal appointment of new trustees; and the legal estate in the premises, if it had not been outstanding, would have been vested in John E. Hall, the testator's son, and heir-at-law.

John E. Hall the elder, and Eliza Hall, having attained twenty-one, granted a lease of 45, Ludgate Hill, on the 10th of November, 1836, to John Nicholson, which was afterwards assigned to Thomas Russell. On the production of this lease in Court, it appeared that it was granted in pursuance of a decree of the Court made in a suit by Hall against Nicholson.

On the first of January, 1848, this lease was surrendered, and John E. Hall the elder (Eliza Hall being then dead), in consideration of such surrender, granted a new lease of the same house, at the same rent, to Thomas Russell, for twenty-one years, from Christmas, 1847.

In October, 1856, the defendant Flight, bought the lease from the executors of Thomas Russell, under the usual condition that he should not inquire into the lessor's title. The lease was, with the licence of John E. Hall, assigned, in October, 1856, to the defendant Cannon, as trustee for Flight.

Eliza Hall married J. P. Robson in 1837, and died in January, 1840, leaving the plaintiff, E. Robson, her only child. John E. Hall died in October, 1857, leaving two children, the infant plaintiffs, Elizabeth E. Hall, and John E. Hall the younger. He devised his real estate to trustees now represented by the defendant Robson, but did not devise his trust estates.

In March, 1864, the house was taken by a railway company.

John Hall, the testator, had mortgaged the house for 800*l.*, and the legal estate in the house was now vested in the defendant Cumming, as holder of that mortgage. The mortgagee had not consented to the leases.

The plaintiffs instituted this suit for the administration of the trusts of John Hall's will, respecting 45, Ludgate Hill, and at the same time sought to have the lease of January, 1848, declared void, except so far as it bound John E. Hall's life interest. They also sought, on the same ground, to charge Flight with mesne profits.

They also prayed to be declared entitled to the whole sum which would be payable by the Railway Company for the fee simple of the house, and not merely to the value of the reversion, subject to the lease of January, 1848.

Southgate, Q.C., and *Bagshaw*, for the plaintiffs, contended that an heir-at-law, on whom the legal estate devolved, in consequence of the failure of the trustees, could not exercise the powers given by the will to the trustees.

That Flight had notice when he purchased, as the lease was granted by John E. Hall alone, while it recited the old lease as granted by John E. Hall and his sister. That should have made him inquire. Buying under a condition not to inquire into the lessor's title, did not enable the purchaser to set up the defence of having purchased for valuable consideration without notice.

Attorney-General v. Backhouse, 17 Ves. 233 ;

Steedman v. Poole, 6 Hare, 193 ;

Attorney-General v. Hall, 16 Beav. 338 ;

Peto v. Hammond, 30 Beav. 495.

Kingdon, for Cummins, the mortgagee, and Robson, the executor of John E. Hall, took no part.

Schryn, Q.C., and *Hemming*, for the defendant Flight, contended—

1st. That purchase for valuable consideration, without notice, was as good a defence for an equitable, as for a legal title. This was established by

Attorney-General v. Wilkins, 17 Beav. 285 ;

which case had since been followed. The defendant Flight was bound by the condition of sale, not to inquire into the lessor's title, and the lease did not suggest any inquiry as necessary. Not to inquire into the lessor's title was the common practice, and was not, therefore, such wilful blindness as would fix the purchaser with constructive notice,

Jones v. Smith, 1 Hare, 43 ;

West v. Reid, 2 Hare, 249 ;

Attorney-General v. Hall, 16 Beav. 338, 392.

Each case turned on the particular circumstances,

Peto v. Hammond, 30 Beav. 495, 508.

2nd. The plaintiffs had received the rent since 1856, and the adult plaintiff had therefore acquiesced.

3rd. This was an administration suit, and the defendant Flight was an improper party, as no collusion was alleged,

Stainton v. Carron Company, 18 Beav. 146.

An owner of property with a cloud on his title had no equity to bring the claimant before the Court, to have him declared not entitled. The only question was, as to who was entitled to the purchase-money of the house. There could be no relief consequential on the declaration sought, and without such relief the Court would not make a declaration.

4th. The power of leasing was in such a form that the Court would, at the suit of the tenant for life, have compelled the trustees to execute it,

Cadogan v. Earl of Essex, 2 Drew. 227 ;

Beauclerc v. Ashburnham, 8 Beav. 322.

It was, therefore, an imperative power, and in the nature of a trust, which the Court would not allow to fail from want of a trustee, but would have compelled the heir to carry out,

Brown v. Higgs, 8 Ves. 569 ;

Attorney-General v. Lady Downing, Amb. 550 ;
Wilm. 1 ;

Lewin on Trusts, pp. 536, *et seq.*

The Court would not, therefore, disturb a *bond fide* execution of such a power by the heir.

5th. The lease of 1848 showed that the point had been decided by the Court, and there should be an inquiry on that point.

Woodroffe, for Cannon.

Southgate, Q.C., in reply, on the 4th point, argued that the power was not imperative, for the word "shall" was a word of futurity, not of command, and "may" was clearly permissive. The cases of *Cadogan v. Earl of Essex*, and *Beauclerc v. Ashburnham* (*loc. cit.*), were distinguishable.

Assuming it to be a trust, it could only be executed by the persons actually named, or by the Court. In *Brown v. Higgs* (*loc. cit.*), and the like cases, the power was coupled with an interest, and they were all cases of appointments of a fund among a class. The maxim that a trust should not fail for want of a trustee, meant that the beneficial interest in the trust should not be lost to the *cestui-que-trusts*.

3 DEC. 1864.

THE MASTER OF THE ROLLS said, that as to the first point of the defendant Flight's defence, the doctrine of purchase for valuable consideration without notice, did not in his Honour's opinion, apply to the case of a person buying a lease at a rack-rent with immediate possession, without inquiring into the lessor's title. If it did so apply, the usual condition that the purchaser of the lease should not inquire into the lessor's title, instead of being injurious to the purchaser, as it was usually considered, would be beneficial to him, inasmuch as the purchaser would be safer if he abstained from inquiry, than if he were, by inquiry, to learn the true state of the title. In the present case, as the lease, on the face of it, purported to be granted in consideration of the surrender of a prior lease, the purchaser had notice of the prior lease, and so had constructive notice of the defect in the lessor's title.

The second point, as two of the plaintiffs were infants, and could not acquiesce, was reduced to an objection to the misjoinder of the adult with the infant plaintiffs. This defect could be cured by making the adult plaintiff a defendant ; an amendment which his Honour would make at the hearing.

The third point should have been taken by demurrer. But, in his Honour's opinion, the bill was

well and properly framed for raising the question between the parties. If the objection were to prevail, it would paralyse the action of the Court in cases where the lessee had sold the property in dispute, and the purchaser had taken possession.

The fourth point was the main ground of defence. It had been argued for the defendant that the power of leasing in the will was not a mere naked power to trustees, but was a trust for the *cestui-que-trusts* of the property, and that, therefore, it could not be lost by reason of the failure of the persons in whom it was vested by the testator: and it was said that the Court would have executed this power and have granted leases, and that if an incompetent person had granted a lease which was for the benefit of the *cestui-que-trusts*, the Court would enforce the lease. Now the distinction between powers and trusts was very fine, and great difficulty arose in the application of it. The distinction was drawn by Wilmot, C.J., in *Attorney-General v. Lady Downing* (*loc. cit.* p. 23), who based the distinction on powers never being imperative, but trusts always so. He also said "if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the Constitution has substituted in its place:" and that applied to a power which was imperative, and, therefore, according to Chief Justice Wilmot's distinction, in the nature of a trust, and also to a power which was so far auxiliary to the trust, that if the power was not executed, the trust failed. Accordingly, where there was a power to sell, and a trust to apply the proceeds of the sale for the benefit of the *cestui-que-trusts*, the Court, holding that the power was auxiliary to, and formed part of, the trusts, had compelled the heir-at-law to join in the sale, and so give effect to the power. The same rule was applicable to a case like the present, where the testator gave a power of leasing for the purpose of dividing the rents among the *cestui-que-trusts*: and the Court would accordingly compel the heir-at-law to join, in order to make such leases valid. It was immaterial whether the words of the will, which conferred the power, were permissive or imperative, if it could be shown that the power was auxiliary or necessary to the trusts of the will. In the present case, as between the tenants for life and the remaindermen, the granting of a lease was essential to the trusts of the will.

Lord Eldon, in *Brown v. Higgs* (8 Ves. 570), had said, "It is perfectly clear that where there is a mere power of disposing, and that power is not executed, this Court cannot execute it. It is equally clear, that wherever a trust is created, and the execution of that trust fails by the death of the trustee or by accident, this Court will execute the trust. One question, therefore, is whether John Brown had a trust to execute, or a power and a mere power. But there are not only a mere trust and a mere power, but there is also known to this Court a power which the party to

whom it is given is intended and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place." Applying Lord Eldon's remarks to the present case, his Honour thought, that if the trustee had not disclaimed, but had refused to execute a lease, the Court would have compelled him to do so, or would have provided for the discharge of the duty to do so by appointing new trustees, or by some other means within the jurisdiction of the Court. If that was correct, it disposed of the question. For that which the trustees ought to do, and would have been compelled by the Court to do, would, if performed in a proper manner by another person, or by the heir-at-law, be sanctioned and enforced by the Court. That frequently happened in the case of persons who, without authority, had paid maintenance for children, and the Court protected them. The accidental circumstance of the legal estate being outstanding could not affect the principle, if the rights of the mortgagees were not interfered with.

It was true a legal lease could not have been granted without the concurrence of the mortgagee, which had not been given, and the mortgagee might, therefore, at any time have ejected the lessee; but that was not material, as the mortgage could be paid off, and on being paid off the whole interest would pass to the testator's heir-at-law. The sale of the house was also immaterial, and the case must be decided as if the house was still specifically in the possession of the lessee, and had not been sold to the railway company. No decree would be made which would affect the rights of the mortgagee and make the lease valid against him, but as between the tenants for life and the remaindermen, the decision must be given as if no mortgage at all had been made, and as if on the disclaimer of the surviving trustee the legal estate had descended to John E. Hall, as the testator's heir-at-law, in which case John E. Hall could have granted a legal lease of the premises.

The present case was not decided on the technical meaning of the words conferring the power, but on the general spirit and scope of the provisions in the testator's will. The words "shall and may," however, in his Honour's opinion, were imperative, and not merely permissive.* It had been assumed throughout that the lease of 1848 was a proper lease at a rack-rent. If it was not a proper lease, it was an improper execution of the power, and would be void, not because it did not execute the power, but because it would be a breach of trust. It appeared that it was a proper lease, and that the whole difficulty had been caused by what had been called the invasion of the City of London by railways, and the consequent increase of the value of the pro-

perty comprised in the lease. Without prejudice to the rights of the mortgagee, he must hold that the lease was valid, and that the bill had failed.

Minute—Dismiss the bill with costs, the mortgagee to take his costs out of his security.

* *Note*.—See, with respect to a power in the nature of a trust,

Nickisson v. Cockill, 2 N. R. 557.

Master of the Rolls. } *BAGOT v. BAGOT.*
15 Nov., 5 Dec. 1864. }

*Mortgage Debt—Primary Liability of the
Personal Estate—Exoneration.*

The devisee of a mortgaged estate created a new mortgage, and with the money so obtained paid off the old incumbrances, together with certain specialty debts of the devisor:—

Held, following *Barham v. The Earl of Thanet* (3 My. & K. 607), that the new mortgage was the debt of the devisee, and was primarily payable out of his personal estate.

The question on this summons was, whether a certain charge on the real estate of Walter Bagot was primarily payable out of his real or out of his personal estate. By a decree in the suit (see *Bagot v. Bagot*, 3 N. R. 347), an inquiry was directed, what mortgages or incumbrances affected the settled estates at the death of Walter Bagot, and which of them was or were primarily payable out of his personal estate.

The facts were as follows—

Walter Bagot, on the death of his father Egerton Arden Bagot in April, 1775, became seised of the family estates in Warwickshire and Lancashire, as tenant in tail in possession. He suffered a recovery, and became seised of these estates in fee simple. At the time when he succeeded his father in the possession of this property, the Warwickshire estates were subject to four mortgages; namely, Wooton's mortgage, contracted in June, 1768, for 1,300*l.*; Charles's mortgage, contracted in July, 1771, for 800*l.*; Bowles's mortgage, contracted in April, 1773, for 3,750*l.*; and Hathaway's mortgage, contracted in May, 1774, for 794*l.* 3*s.* 4*d.* The three last of these mortgages amounted in the whole to 5,344*l.* 3*s.* 4*d.* The Lancashire estates were subject to a mortgage to a Mr. Whalley for 2,200*l.*

In July, 1787, Walter Bagot mortgaged the Lancashire estates for 8000*l.*, and with the money so raised he paid off Whalley's mortgage, so as to make the 8000*l.* the sole charge upon the Lancashire estates; he also paid off the whole of the three last mortgages which affected the Warwickshire estates: and 455*l.* 16*s.* 8*d.*, specialty debts due by his father. A portion of the mortgage debt of 8000*l.* was by Walter Bagot subsequently paid off to the extent of 2,666*l.* 5*s.*, and at his death the only charge upon the property

was the 5,333*l.* 15*s.*, the remainder of the 8000*l.* mortgage.

The question was, as between Walter Bagot's personal estate and real estate, which was the primary fund to pay this 5,333*l.* 15*s.*

Osborne, Q.C., and *Coll*, for the plaintiff, contended that Walter Bagot's personal estate was primarily liable; the 8000*l.* mortgage was his debt, and not that of his father. The question was, whether he intended to create a new security, for which he would be personally liable,

Townshend v. Mostyn, 26 Beav. 72;

Barham v. The Earl of Thanet (*loc. cit.*).

Had he intended to keep on foot the old incumbrances, he would have had them assigned to a trustee for himself; but as he had not done so, they were extinct.

Hobhouse, Q.C., and *Kelly*, for the tenant for life of the real estate, supported the contention of the plaintiff.

Selwyn, Q.C., *Baggallay, Q.C.*, and *Rasch*, for the defendants, contended that the 5,333*l.* 15*s.* was payable primarily out of the mortgaged estate. The 8000*l.* did not get into the pocket of Walter Bagot, but had been applied in the payment of his father's debts. His personal estate not having had the benefit of the 8000*l.*, could not be made to repay it in exoneration of the mortgaged estate. The transaction was in substance a transfer of the old incumbrances, and not a new mortgage. They cited,

Earl of Tankerville v. Fawcett, 1 Cox, 237;

Hickling v. Boyer, 3 Mac. & G. 635;

Cooton Mortgages, 317 (3rd ed.);

Burrell v. The Earl of Egremont, 7 Beav. 205;

Hedges v. Hedges, 5 De G. & Sm. 330;

Gryce v. Shaw, 10 Hare, 76;

Johnson v. Webster, 4 De G. M. & G. 474;

Swainson v. Swainson, 6 De G. M. & G. 648;

The Earl of Clarendon v. Barham, 1 Y. & C. C. C. 688.

Hobhouse, Q.C., in reply, contended that where, as in the present case, a new mortgage was raised by the devisee, and there was no transfer of the old incumbrances created by the devisor, the money raised by the new mortgage became the debt of the devisee, for which he was personally liable.

It was said that the personal estate of Walter Bagot had received no benefit from the 8000*l.*, but such was not the case. Walter Bagot took possession of his father's personal estate, the value of which was never ascertained, he therefore must have been liable to pay his father's debts; and part of the 8000*l.* had been expended upon specialty debts, which would otherwise have been paid out of the personal estate.

THE MASTER OF THE ROLLS said: He was unable to distinguish the present case, in principle, from that of *Barham v. The Earl of Thanet* (*loc. cit.*). The

decision in that case was one which, at the time, was thought to be open to some question, by the counsel engaged in it on behalf of the plaintiff, and they advised an appeal, which, for family reasons, was not prosecuted, but it had always been cited and treated as a binding decision, and it would not be possible for the Court to avoid following it on the present occasion.

In the opinion of his Honour, the present case was a stronger case for making the mortgage a debt of the owner of the land than the case of *Barham v. The Earl of Thanet* (*loc. cit.*). In that case, Charles, Earl of Thanet, became the owner of the family estates, subject to a mortgage of 80,000*l.* He paid off 50,000*l.*, part of that debt, out of his own moneys, and the remainder, which was 30,000*l.*, he assigned to a new mortgagee, who advanced that 30,000*l.* to pay the original mortgage: he reserved a new equity of redemption, and a different rate of interest, and Sir John Leach held, that in that state of circumstances, this 30,000*l.* became a debt of Earl Charles, and was payable out of his personal estate. In the present case Walter Bagot, having various mortgages affecting his property, and also having specialty debts which he was bound to pay out of his father's property, mortgaged the Lancashire estate for 8000*l.*, and with the money so obtained he paid off the mortgage of 2,200*l.* affecting the Lancashire estates, he paid off three mortgages affecting the Warwickshire estates, amounting altogether to 5,344*l.* 3*s.* 4*d.*, and he paid 455*l.* 16*s.* 8*d.*, specialty due by his father. The consequences were obvious that this was not the transfer of any existing security, but was, in truth, a new and distinct mortgage created by Walter Bagot, and it did not become less his debt because he chose to apply the money in the payment of charges which he was not liable personally to pay; suppose that the whole had been applied in payment of the debts of his father, it would equally have been a debt of his. He borrowed the money for certain purposes, and he became liable to pay the money so borrowed. If the mortgagees who had advanced the 8000*l.* had paid the money to the other mortgagees, who had simply transferred their securities to him, although Walter Bagot had covenanted to pay the 8000*l.*, his personal estate would not in that case have been the fund primarily liable to pay; but it was otherwise when he borrowed the money for such purpose as he thought fit, and gave a new mortgage for it, received the money, and applied it in payment of various debts which he might, or might not, be personally liable to pay.

His Honour was of opinion, therefore, that the personal estate of Walter Bagot was the fund primarily liable to pay the mortgage debt of 5,333*l.* 15*s.*

Minute.—Decree that the mortgage debt of 5,333*l.* 15*s.* is payable primarily out of the personal estate of Walter Bagot.

Master of the Rolls. } GRAHAM v. WICKHAM.
5 DEC. 1864.

Costs—Executor.

An executor will not be allowed in his discharge the costs of defending a suit brought to establish a claim against his testator's estate, unless the decree in that suit gives him permission to prove for them in the administration suit.

This was a petition in the above suit by the defendants, the executors, seeking to be paid out of a fund in Court certain costs which they had incurred. Some of these costs were incurred in defending (unsuccessfully) a suit of *Rawlins v. Wickham* (3 De G. & J. 304), which was a suit to establish a claim against their testator's estate. By opposing this claim in Chambers, they had succeeded in reducing the amount by 2,000*l.* The cause had been heard by Stuart, V.-C., and on appeal by the Lords Justices, and no costs were given on either side. Another part of the costs had been incurred in a suit of *Wickham v. Bailey*, which was instituted by the executors to secure part of the estate of the testator. The Chief Clerk had made his certificate of the costs, charges, and expenses of the executors.

G. L. Russell, for the petitioners, argued that the costs were necessarily incurred by the executors for the benefit of the testator's estate.

J. Hinde Palmer, Q.C., and Welford, *contra*, were not called upon.

THE MASTER OF THE ROLLS said, that it would be irregular to make the order. In a suit instituted against executors it was the practice, if the executors were entitled to costs, to direct in that suit, that the executors should be allowed to prove in the administration suit for such costs as part of their discharge, and the omission of such a direction showed that the Judge who heard the cause thought they were not entitled to their costs. If the practice were otherwise, his Honour would have to hear the cause of *Rawlins v. Wickham*, to know whether the executors had properly defended the suit, and would thus be sitting in judgment on the decision of Stuart, V.-C., and the Lords Justices. If such an order had been made in *Rawlins v. Wickham*, or in *Wickham v. Bailey*, his Honour would have allowed the petitioners their costs as part of their discharge, but no such order had been made, and he must dismiss the petition with costs.

Master of the Rolls. } *Re* THE EAST BOTALLACK
5, 6 DEC. 1864. } MINING COMPANY.

Winding-up—Jurisdiction—Stannaries—25 & 26 Vict. c. 89, s. 81.

A company for working mines in Cornwall and registered in the Stannaries Court, never commenced

working, and had contracted no debts within the jurisdiction of the Stannaries:—

Held, on a winding-up petition, that the Court of Chancery had no jurisdiction.

The East Botallack Mining Company was formed for working mines in Cornwall, and had been registered in the Court of the Vice-Warden of the Stannaries. By the articles of association the chief office was to be in London, and offices were taken in London. The company advertised, but never proceeded further, and never were actually engaged in working any mine within the jurisdiction of the Stannaries, and had incurred no debts within the jurisdiction of the Stannaries; all the debts contracted were contracted in London.

The petitioner, whose debt was incurred in London for printing for the company, had obtained judgment and issued execution, and the sheriff had made a return of *nulla bona*. He therefore presented this petition to wind up the company.

Brookbank, for the petitioner.

By the 81st section of the Companies Act, 1862 (25 & 26 Vict. c. 89), the Court of the Vice-Warden of the Stannaries is made the Court for winding-up a company "engaged in working any mine within, and subject to, the jurisdiction of the Stannaries." The reason is, that where the company was working, there would most of the creditors be. This company never was engaged in working, and all its debts have been contracted in London. In section 174, respecting the registration of companies, the expression is companies "formed for working mines."

Jessell, for the company.

According to the petitioner's contention, a company which has been working within the jurisdiction of the Stannaries for thirty years could not, if it stopped for a week, be wound up in the Court of the Vice-Warden. This company is registered in the Court of the Stannaries, and the only object of that is to give that Court jurisdiction. The expression "engaged in working mines," is used in section 4, where it cannot mean "actually engaged."

Brookbank, in reply.

THE MASTER OF THE ROLLS said, that the jurisdiction in this case was that of the Stannaries. It had been argued indeed to the contrary, on the ground that the company had never gone further than issuing a prospectus. But the company was formed for working mines in Cornwall, and the expressions in the Companies Act clearly showed that the purpose for which the company was established was the essential point which regulated the jurisdiction, and not the fact of an actual working within the jurisdiction. For if it was otherwise, a company which, when working, was within the jurisdiction of the Stannaries, would, on ceasing to work, be taken out of it. Moreover, the

company had been registered in the Stannaries Court. The Court of Chancery had no jurisdiction, and the petition must be dismissed with costs.

Master of the Rolls. } FORDHAM v. FORDHAM.
6 DEC. 1864.

*Disentailing Deed—Future Rents—3 & 4
Will. 4, c. 74.*

Land was devised to trustees for twenty-one years upon trust for accumulation, with remainder to A for life, and to his sons in tail. The accumulations were to be settled to the same uses. The eldest son of A disentailed, and jointly with A filed a bill to obtain possession of the property before the expiration of the twenty-one years:—

Held, that the disentailing deed barred the entail in the rents to accrue in future, as well as in those already accrued, and that A and his son were entitled to possession.

G. Fordham by his will, in 1854, devised his real and copyhold estates unto and to the use of J. E. Fordham, J. Fordham, and E. K. Fordham, upon trust to receive the rents for twenty-one years after his decease, and upon trust to invest the surplus rents (together with his personal estate), in the purchase of freeholds of inheritance, to be vested in the trustees in fee simple, and he empowered his trustees to enfranchise and sell copyhold estates, and to manage his estates; and he declared his will to be, that, after the expiration of the twenty-one years, the trustees should hold his estates, and the estates to be purchased, upon trust for the plaintiff, F. N. Fordham, for life, with remainder upon trust for the sons of F. N. Fordham successively according to seniority in tail male, with remainders over to certain of the defendants.

The testator died on the 5th of January, 1855, and J. Fordham and E. K. Fordham proved the will alone, and J. E. Fordham disclaimed. The other trustees had carried out the trusts of the term of twenty-one years.

The plaintiff, F. J. Fordham, the eldest son of F. N. Fordham, attained twenty-one on the 11th of November, 1863. One of the defendants was the only other son of G. N. Fordham.

On the 12th of November, 1863, F. J. Fordham, with the consent of his father, executed a disentailing deed, which conveyed the freehold estates of the testator, subject to the life estate of F. N. Fordham, to F. J. Fordham in fee. He and his father, consequently, claimed to have the testator's estates transferred to them, and on the refusal of the trustees to convey or give up possession, instituted this suit against the trustees and remaindermen, praying that it might be declared that they were the only persons entitled to any beneficial interest in the rents and profits of the testator's estates, and that the trustees might be ordered to deal with the estates as the plaintiffs should direct.

Baggallay, Q.C., and *Bedwell*, for the plaintiffs, contended that the disentailing deed barred the beneficial interest of every person, other than the plaintiffs, under the testator's will, and that they were entitled to the possession of the property, although the term of twenty-one years had not expired.

Archibald Smith, for the trustees, submitted whether the disentailing deed could affect rents which had not accrued at the date of the execution of it. The Act 3 & 4 Will. 4, c. 74, only enabled persons to disentail money subject to be immediately laid out in land, and not money to be received at a future time.

Formerly the Court, when money was subject to be invested in the purchase of land to be entailed, allowed the money to be paid directly to the person beneficially interested in two cases only,—viz., where the whole interest of the estate to be purchased was in one person, so that the entail could be barred by a fine, or where the remaindermen consented. In all other cases the money was obliged to be actually laid out in land, to enable the tenant in tail to suffer a recovery of it,

Benson v. Benson, 1 P. W. 130;

Short v. Wood, 1 P. W. 470;

Trafford v. Boehm, 3 Atk. 440, 446.

To avoid that circuitous method of barring estates tail in money subject to be invested in land, the Acts 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45, were passed. The only object of those Acts was to put the money on the same footing as if it had actually been invested in land. The Act 3 & 4 Will. 4, c. 74, only intended to provide a less circuitous mode of disentailing, not to extend the power of disentailing. Under the old system, then, future rents clearly could not have been disentailed, and could not, therefore, now be disentailed.

Snape, and *J. Yates Lee*, for other defendants, took no part in the argument.

THE MASTER OF THE ROLLS said, that the plaintiffs were entitled to a decree. The case was the same as if there was merely a tenant in tail. Before the Fines and Recoveries Act, a tenant in tail would have been entitled, year by year, to receive the rents from the trustees before they were invested in land, and thus the money never could possibly be invested in land. And there was no other person interested in them. Moreover, the words of the statute 3 & 4 Will. 4, c. 74, was clear; the words, "money to be invested in the purchase of lands," was declared by the 1st section of the Act to mean "money raised, or to be raised." These future rents were money to be raised. It must be declared that the plaintiffs were entitled to the beneficial interest in the rents and profits of the real estate.

Kindersley, V.-C. } RILEY v. CROYDON.
5, 6 DEC. 1864.

Equity of Redemption—Tenant for Life and Remainderman—Right to Redeem—Costs.

Where the tenant for life of an equity of redemption mortgaged his life interest, and the mortgagee filed a bill to redeem, and to compel the remainderman to redeem him, or be foreclosed, and the tenant for life died before the hearing:—

Held, 1st. *That in no case could the remainderman be compelled to redeem:*

Held, 2nd. *That the tenant for life having died, the interest in respect of which the right to redeem existed, was gone, and the bill must be dismissed with costs.*

Isaac Gibson was tenant in fee of two plots of land. He mortgaged the one in fee to the defendant Croydon, and the other to the defendant Whitmore. He then devised the property, subject to these mortgages, to his wife for life; after her death, to his children by his second marriage; and if they should all die, leaving no issue, to his grandchildren. After Isaac Gibson's death, his widow mortgaged her life interest in the property to the plaintiff, for ninety-nine years, if she should so long live. She afterwards became bankrupt. The plaintiff originally filed his bill against the two prior mortgagees and the assignees in bankruptcy of the widow. The assignee disclaimed, and the bill was amended, making the three surviving children of Isaac Gibson, by his second marriage, parties.

The bill, as amended, prayed that an account might be taken against the defendants Croydon and Whitmore, as mortgagees in possession; and that the plaintiff might redeem them, on payment of what should be found due to them; and that the other defendants might redeem the plaintiffs, or else be foreclosed. Before the cause could be brought to a hearing, the widow, the tenant for life, died.

The cause now came on to be heard, on motion for decree.

Glasse, Q.C., and *A. E. Miller*, for the plaintiff.

The present case is similar to those in which, as the ground has been cut away from under the plaintiff's feet, after the institution of the suit, without fault of his, the bill will be dismissed, at the hearing, without costs,

Robinson v. Rosher, 1 Y. & C. Ch. 7;

Broughton v. Lashmar, 5 M. & Cr. 136;

Sutton Harbour Company v. Hitchens, 1 De G. M. & G. 161.

That we ought to bring the remaindermen before the Court, is shown by

Colyer v. Colyer, 30 L. J. Ch. 408 (on another point).

Baily, Q.C., and *Speed*, for the defendant Croydon.

W. F. Robinson, for the defendant Whitmore.

Toller, Q.C., and Murray Browne, for the other defendants the remaindermen.

It is essential that one who seeks to redeem should have at the time of so doing, the estate which gives him the title to redeem,

Wicks v. Scrivens, 1 J. & H. 215.

In a suit by a tenant for life to redeem, should there be redemption, the costs of the remainderman are paid by tenant for life, are added to his own, and are charged upon the inheritance.

They also cited,

Chappel v. Rees, 1 De G. M. & G. 393 ;

Fisher on Mortgages, 618.

Glasse, Q.C., in reply.

6 DEC. 1864.

KINDERSLEY, V.-C., said : The plaintiff had not brought before the Court the persons entitled in default of issue of the children of Isaac Gibson by his second marriage ; this, however, was merely a default in respect of parties. The bill assumed that the plaintiff had a right to redeem the prior mortgages, and, moreover, that he could then compel the remainderman to redeem him. In the simple case of an equity of redemption devised to one for life, remainder over, it was now established that the tenant for life had a right to redeem ; but it was also established that the tenant for life so redeeming had no right to compel the remainderman to redeem him. He might, however, bring the remainderman before the Court on his bill to redeem, in order that, when he had redeemed, he might stand as against the owners of the estate (including himself) as having a charge of so much money on the estate. This obliged him to pay the costs of the remainderman, as well as his own and those of the mortgagees, in fact, all the costs of the suit ; but when his representatives came for foreclosure, they had a right to include all those costs in the amount to be paid to them as the alternative to foreclosure. A person taking an assignment of the interest of the tenant for life was in precisely the same position,—stood in his shoes ; and so would the present plaintiff have done, had matters remained in the position in which they were when the bill was filed. But the tenant for life had died before the cause was heard, and there was an end of the interest.

It had been suggested, that if the mortgagees (who were in possession) had received from the estate an amount greater than their annual interest, the tenant for life would have paid off a part of the principal sum due ; and that this interest would have continued notwithstanding the death of the tenant for life, and would have enabled the Court to make the same decree for redemption as if she were still living. But the bill asked for no such relief ; it did not state the necessary facts on which to found it,—as that the income of the estate produced to the mortgagees more than the interest due. He could give the plaintiff no relief ; the state

of things which had entitled him to relief, had ceased to exist.

The bill must be dismissed ; but it was a hard case, and the question was, what was to be done with the costs. It had been contended, that there should be no costs, in analogy to those cases where a bill had been filed on the authority of a decision, and before the hearing that decision was held not to be law ; and again, where a bill had been filed under a common mistake. But the analogy did not hold. The plaintiff had filed his bill on the existence of a life estate, and he must have known that that estate might determine at any time. He took his chance, and the chance had turned out against him. Even if the tenant for life were still living, and the plaintiff had succeeded, he must in the first instance have paid the costs of all parties. *A fortiori* as things had gone against the plaintiff, the bill must be dismissed with costs.

Stuart, V.-C. } MARSHALL v. SMITH.
3, 5, 6 DEC. 1864. }

Husband and Wife—Dower—Statute of Limitations (3 & 4 Will. 4, c. 27)—Laches.

A claim of dower held to be barred by thirty years' delay.

Samuel Smith died seised in tail in 1829. His widow married again, but never made any claim of dower. She and her second husband now filed a bill for a declaration of her right to dower, and a commission if necessary. The defendants admitted the facts, but relied on the Statute of Limitations and laches.

Malins, Q.C., and Hardy, for the plaintiffs.

1st. The Statute of Limitations (3 & 4 Will. 4, c. 27), does not apply to dower. None of the cases in the 3rd section are applicable to dower. "Action" in the 2nd section means an action which results in possession, which the writ of dower does not, before assignment. "Tenant" in dower, in the 1st section, refers to a dowress after assignment.

The Real Property Commissioners recommended a provision barring dower, but it was not adopted (see their 1st Report, Prop. 17, p. 79). The reason is, that the statute does not include incorporeal hereditaments, except tithes, advowsons, and rent-charges, whereas dower attaches on incorporeal hereditaments.

2nd. If the statute applies, then the admission in the answers of the facts of the seisin, marriage, and death of the husband constitutes an acknowledgment within the meaning of the 14th section. It is no less an admission because the statute is pleaded. You cannot effectually plead the statute where, contemporaneously or before, you acknowledge the right. The defendants ought simply to have pleaded the statute,

Goode v. Job, 28 L. J. (N. S.) Q. B. 1 ;

Cottingham v. Fletcher, 2 Atk. 155 ;

Mitford's Pleadings, 4th ed., 265, 299, 319, 320.

The defendants only ask to be in as good a position as if they had claimed the benefit of the statute by way of plea, and in that case their answer would have overruled their plea. The only case in which the plea and answer can stand together is where the plaintiff states a case within the statute with allegations which, if true, would take it out of the statute.

3rd. The doctrine of laches does not apply. Dower is not an estate in the land until it has been assigned, *Park on Dower*, 283, 311, 334, 335 ; *Gilbert on Tenures*, 27 (Watkins & Vidal's ed. p. 46) ;

Rowe v. Power, 2 Bos. & Pull. N. R. 1.

It does not even confer a settlement in a pariah,

The King v. The Inhabitants of North Weald Bassett, 2 B. & C. 724.

The possession of the heir is the possession of the widow, and not adverse to her. The heir does no wrong till demand made.

For laches to apply, some one else must have held the property adversely,

Dean of Ely v. Bliss, 2 De G. M. & G. 459 ;

Bryan v. Horseman, 4 East, 599 ;

Moody v. Bannister, 4 Drew. 432, 442.

Besides, this is not a purely equitable jurisdiction, but only in aid of a legal right ; and if the law does not impose a bar, Equity will follow the analogy of the law.

Osborne, Q.C., and *Archibald Smith* ; *Bacon, Q.C.*, and *Charles Hall* ; and *Jessel*, for the several defendants contended,

1st. We rely on the doctrine of laches,

Marquis Cholmondeley v. Lord Clinton, 2 Jac. & W. 139, 149 ;

Pickering v. Lord Stamford, 2 Ves. jun. 581.

2nd. There is no acknowledgment of the plaintiff's title at all, and the admission of facts which would give her a title apart from the statute does not preclude us from pleading the statute,

Blagden v. Bradbear, 12 Ves. 466, 471.

Besides, our acknowledgment, to come within the 14th section, must be before bill filed,

Bateman v. Pinder, 3 Q. B. 574.

3rd. It would be strange if the Act "for the limitation of actions and suits relating to real property," did not cover the right to dower. The writ of dower is classed among real actions in section 36, and it is an action to recover land,

Grant v. Ellis, 9 M. & W. 113 ;

Shelf. R. P. S. 153-156 (7th ed.) ;

William v. Gwyn, 2 Wms. Saund. 43, note :

see, also, the form of the proceedings at law in,

10 Went. Prec. 159,

and of the decree in Equity in,

Bamford v. Bamford, 5 Hare, 203, 206.

The only difference between it and other real actions was, that the land not being specified, the widow could

not enter on the judgment, but must wait for assignment : "Land" in the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 77, includes a right to dower.

Besides, the general words of statutes must be liberally construed to cover a case which is within the mischief aimed at,

Beckford v. Wade, 17 Ves. 87, 91.

It is said that dower is a very peculiar right before assignment. Certainly the widow has no seisin ; but her right is very different from a mere right of action : it is a continuation of her husband's estate.

It is not true that the statute only includes incorporeal hereditaments. The clause suggested by the Real Property Commissioners was left out, in order that the period of limitation to the right to dower might vary with the nature of the property out of which it was sought.

There are cases in which it will be admitted that dower is within the statute. Suppose a man seised, but out of possession at the time of his marriage. The husband would be the person through whom the widow claimed, and time would run against her from his dispossession, although she never obtained an assignment at all. Again, there used to be dowerment *ad ostiam ecclesie*, and dowerment by assent of the father ; and in some places, by custom, dower was of the whole of the lands : in all these cases, the land being ascertained, the widow could enter, but her remedy was nevertheless by writ of dower. It is impossible, therefore, to say that the writ of dower is not within the statute.

STUART, V.-C., said that he had to decide the present case without the assistance of any authority directly in point.

The case had been argued by reference to the Statute of Limitations of 1833. That statute contained a series of enactments distinctly referring to rights and proceedings at law. It also contained distinct enactments (sections 24 and 27) referring to proceedings in Equity. The present question was an equitable one, and, therefore, although it was useful to have the legal sections commented upon, the Court must be guided in its decision by the sections applicable to equitable jurisdiction.

The right to dower was, generally speaking, a purely legal right. The first proceeding to enforce it was a writ of dower to have it assigned. It had been argued that the statute did not apply to that proceeding. The words of the interpretation clause were, "The word 'land' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, . . . and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure." If it were necessary to decide the point, on the construction of the statute, he should say that dower was an interest in land. Then the second section was distinct

and positive. "No person shall make an entry or distress, or bring an action to recover any land or rent," but within twenty years next after the right first accrued. Taking "land" to include an interest in land, and taking dower to be an interest in land, his impression was, that there could be no sound interpretation of the statute, which did not hold that the right of the widow to have her writ of dower was a right to bring an action to recover land.

With these views, he should think it impossible, in a Court of Law, to say that the case was not within the statute, and that the widow who came for her dower, after thirty-one years, did not come too late.

The argument on the third section was unnecessary, because it had been truly said, that the right to dower, before assignment, was an anomalous right. The language of the section, if it be critically considered, was not easily applicable to the case of dower. It had been argued that the right was so anomalous, that the possession of the heir was the possession of the widow; but that was only true in the sense that the possession of the heir protected that of the widow against strangers; as between themselves the fact that arrears of dower could not be recoverable after six years showed that there could be adverse rights.

But this case must go on the sections which prescribed what was to be done in Courts of Equity. Before the statute, in the celebrated case of *Marquis Cholmondeley v. Lord Clinton* (*loc. cit.*), discordant opinions were entertained as to the effect of length of time on an equitable right. Sir W. Grant came to the conclusion that Lord Cholmondeley was not barred. When the case came before Sir T. Plumer, he exposed satisfactorily to the minds of all lawyers that Sir W. Grant's decision was based on principles which would not bear close examination. Lord Eldon and Lord Redesdale, in the House of Lords, entirely adopted Sir T. Plumer's view of the law. That law was very clearly and concisely stated by Lord Redesdale, who said (see 2 Jac. & W. 152),—"I think the rule has been laid down, that every new right of action that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years. In every case of equitable title (not being the case of a trustee, whose possession is consistent with the title of the claimant) it must be pursued within twenty years after the title accrues."

Here was a bill in Equity by a lady who, for thirty-one years, had slept upon her right, acquiesced in the possession of the heir, and not sought to enforce her claim by any process of Law or Equity; and he thought she was barred.

The bill must be dismissed with costs. He had an impression that the Court did not give costs in cases of dower; but he had looked into the authorities, and found that the Court did dismiss bills for dower with costs.

Wood, V.-C. } STRAKER v. HAETLAND.
24, 25 Nov. 1864.

Ship—Liability—Interest—25 & 26 Vict. c. 63.

Where a ship has damaged another ship, and the latter is in ballast, interest from the time of collision is to be added to the 8l. per ton; which (25 & 26 Vict. c. 63, s. 54) is the maximum damages payable.

This was a bill filed by the registered owners of the British screw steamship, "Joseph Straker," of 713³/₈ tons gross registered tonnage, against the former owners of the Bremen barque, "Karla," which had been run down by the "Joseph Straker," praying that they might have liberty to pay into Court the 8l. per ton, making a total of 5,711¹/₂l., to which their liability was limited by the 54th section of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), and that that amount might be apportioned among the defendants, and the other persons (if any) entitled to damages for goods or other things on board the "Karla" at the time of the collision; and for an injunction to restrain the defendants from taking any further proceedings against them in the Court of Admiralty.

The collision took place on the 26th of September, 1863. It caused no loss of life or personal injury, and occurred without the actual fault or privity of any of the owners of the "Joseph Straker."

On the 29th of September, 1863, the owners of the "Karla" commenced proceedings in the High Court of Admiralty, in England, against the "Joseph Straker;" and they arrested the "Joseph Straker;" but her owners gave bail for her value at 8l. per ton. After considerable litigation in the Court of Admiralty and the Privy Council, the owners of the "Joseph Straker" were held liable for the damage sustained by the "Karla," and upon the owners of the "Karla" taking further proceedings in the Court of Admiralty to enforce payment, they instituted the present suit.

The only point in dispute was, whether the plaintiffs were to pay any interest upon the 5,711¹/₂l. to be paid into Court by them.

It was admitted at the bar, though not stated in the pleadings, that the "Karla" was in ballast at the time of the collision.

Roll, Q.C., and *Druce*, for the plaintiffs, argued, that as the statute expressly limited the owner's liability to a definite sum, they could not be required to pay interest in addition. His Honour had, in

The African Steamship Company v. Swanzy, 25 L. J. (N. S.) Ch. 870, reported on other points, 2 K. & J. 660,

put that construction upon the same words in the 504th section of the Merchant Shipping Act, 1854.

The plaintiffs had not forfeited their statutory right to pay 8l. per ton in satisfaction of their liability, and consequently the Court could not impose terms upon them.

[Wood, V.-C. referred to,
Nixon v. Roberts, 1 J. & H. 739, 748.]

Sir H. Cairns, Q.C., and *Dickinson*, for the defendants, relied upon the recent decision in the Court of Admiralty,

The Amalia, *infra*.*

If the plaintiffs had not liberated their ship from arrest, the Court of Admiralty would have had the same jurisdiction, in the present case, as the Court of Chancery was now asked to exercise,

24 & 25 Vict. c. 10, s. 13.

And even if taking bail had deprived the Court of Admiralty of their concurrent jurisdiction, the rule as to interest ought to be the same in both Courts.

* This was a case of collision in the Mediterranean between "The Amalia," a British ship, and the "Marie de Brabant," a Belgian steamship. The latter was sunk, with all her cargo.

The case is reported in 2 N. R. 462 (Adm.), and 583 (P. C.), where the facts are fully stated. The question to be decided was, whether the benefit of the limited liability conferred by the Merchant Shipping Acts extended to the case of a collision between a British and foreign vessel, and as to extent of jurisdiction. The decision was in the affirmative, and "The Amalia" was condemned in damages, which, under the 54th section of 25 & 26 Vict. c. 63, were limited to 8*l.* per ton. Subsequently a question arose as to whether interest on the damages payable was chargeable; and on this point Dr. Lushington delivered the following judgment, on the 15th of November, 1884.—

DR. LUSHINGTON said: Since this case came before the Court, he had had the advantage of very detailed information from the Registrar as to what had been the practice of the Court, and he had directed his attention to the consideration of not only what had been, but what in future ought to be, the practice. For it was obvious that if a practice had prevailed in the registry of the Court of Admiralty for a series of years without objection taken to it, such practice ought not to be departed from unless on serious grounds.

The question which he had now to consider was, whether in any instance, and what, interest ought to be given to the party who had been aggrieved by the collision.

Now, where a collision had taken place, and one of the parties to the collision had been placed in the situation of the wrong-doer, according to all ordinary principles of justice the party injured ought to receive full and entire indemnity for his loss. That was a principle of common justice. It undoubtedly was the rule originally prevailing in all these cases, and was technically styled, *restitutio in integrum*. It was not only the doctrine of the Court of Admiralty, but the doctrine of the Courts of Common Law. In Lord Stowell's time, before any statute was passed as to limited liability, it was understood that the party aggrieved was entitled to full, entire indemnity of the loss; and Lord Stowell enunciated that principle, and acted upon it upon several occasions.

There was, it must be observed, an inherent difficulty in ascertaining the precise amount of the loss or damage inflicted to the owners of the vessel which was run down, where the vessel was totally lost. The practice of the Court had, accordingly, been as follows: The Registrar and merchants had not attempted to estimate the value of the ship and freight at the date of the collision; but they inquired—1st. What would have been the amount of freight payable had she arrived at the port of destination? 2nd. The amount for which the ship would have sold at the port of destination after she had discharged her cargo? The aggregate of these

As the "Karla" was in ballast at the time of the collision, interest should be given from the time of the collision.

Rolt, Q.C., in reply.

WOOD, V.-C., said, that it was perfectly clear on which side justice was. Justice required that a debt should be paid as soon as it became due; and that if it were not paid, it should carry interest. A difficulty arose here, as in other cases, respecting the power of the Court to fix persons with interest in the absence of an express contract or enactment; but as Dr. Lushington had observed in his judgment in *The Amalia*, (*loc. cit.*), interest was not given for indemnification, but because the loss was not paid for

two amounts was taken to be the value of the ship and freight, and interest on that sum was allowed, not from the date of the collision, but from the time when she would probably have reached the port of destination.

It was quite clear, that to give interest from the period of the collision itself, would have been an injustice to the wrong-doer, if he might use such an expression, because it would be allowing interest twice over, freight being, in one view, of the nature of interest.

Upon what ground then was interest given? Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money, it is a loss in the common sense of the word, but a loss of a totally different description and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision. The principle, therefore, which the Registrar and merchants had acted upon was that which he had just stated: viz., to give interest from the time when the loss ought to have been paid for. Thus Lord Stowell expressly stated in the case of *The Dundee* (2 Hagg.), that he gave interest beyond the value of the damaged ship by reason of detention of payment and not by way of damages. To that principle his Lordship entirely acceded.

He had now to consider whether the Legislature, in granting limited liability, and more especially by the recent statute enacting that the liability of the wrong-doing ship should be limited to 8*l.* per ton, intended that the sum at which the liability was so assessed should not bear interest from the time when it ought to have been paid; in other words, whether the Legislature had tied the hands of the Court and prevented it from doing that which hitherto had been considered to be just and right. What was the substitution that had taken place under the new statute? The change of the law might be thus regarded,—viz., first, the liability had been limited; then the liability had been limited to the value of the ship and freight; and, now, the liability of the ship and freight was limited to 8*l.* per ton.

He thought, that in holding that interest should be given beyond the liability of 8*l.* per ton, which was the maximum fixed by the recent statutes, he was only acting upon the same principle as that upon which Lord Stowell had formerly acted, in giving interest where the liability was limited to the value of the offending ship and freight.

He apprehended that 8*l.* per ton was very properly given, in order to pay for the damage, and to that limit it was restricted; but it never was intended by the Legislature to make it the interest of the party who had to pay to delay that payment to the utmost of his power. That would be an injustice to the party who had to receive the amount. On the whole, he considered that the practice of the Court was consistent with justice and equity; and he should act upon it.

at the proper time. At what time then would the owners of the one ship become indebted to the owners of the other? Unless the Legislature had interfered by saying that they were only to be liable for the value of the ship and freight, and unless it had been considered by the Court of Admiralty, that the freight would cover the liability for interest until the ship's arrival in port, this time would clearly have been the time of collision. He was inclined to think that where the ship was earning freight the 8l. per ton was perhaps intended to include the whole liability until the ship's arrival in port; but this was not material here, as the "Karla" was in ballast.

The only difficulty he had felt was, as to how far this Court had jurisdiction to give interest; but it was impossible to look at the course pursued in the Court of Admiralty, without being satisfied on that point. Where, in a particular Court, interest was always paid upon a particular kind of demand, the payment of interest under those particular circumstances became part of the law of that Court. It was part of the law of the Court of Admiralty, that interest was payable upon the value of the ship and freight from the time of arrival in port; and that as regards ships in ballast, the interest was payable from the time of the collision. Interest ought to begin to run at any rate from the time of an application for payment, otherwise the damages would never be paid, unless under considerable pressure. If the interest were to begin only from the commencement of the proceedings in the Court of Admiralty, that would make three days' difference; but the Legislature never intended that there should be two different rules of practice upon this point, according as the plaintiff applied to this Court, or to the Court of Admiralty.

Minute.—Plaintiff to pay into Court 5,711l.,—with interest at 4l. per cent. from date of collision.

Wood, V.-C. } BETTS v. DE VITRE.
8 DEC. 1864. }

*Practice—Patent—Injunction—Damages—
Directors of a Company—Costs.*

Where a suit was instituted by a patentee for the purpose of restraining the defendants from infringing his patent, and for an account of profits; and a trial before the Court without a jury had established the facts of the validity of the patent and the infringement—the Court refused to give damages instead of an account of profits, although it had jurisdiction to do so; but leave was given to the plaintiff to bring an action to recover damages, or, alternatively, to take an account of profits in this Court.

Where the directors of a company with limited liability were made defendants in a suit to restrain the infringement of a patent, the bill charging that

*they had personally interfered and infringed the patent, and praying that the defendants might pay the costs:—
Held, that the directors were personally liable.*

This was a suit instituted by the plaintiff, the owner of a patent for making capsules for bottles, against a company with limited liability, and two of the directors of it, for the purpose of restraining the company, their servants, and agents, from infringing the patent; the bill charged that the company had infringed the patent; and that the defendants, the directors, had personally interfered in the management of the company and in such infringement. It prayed for an injunction, and for an account of profits, and that the defendants might pay the costs of the suit. A trial was had before the Court without a jury, resulting in the establishment of the patent and the infringement. On motion for decree, the plaintiff asked that, instead of a simple account of the profits made by the defendants through their infringement of the patent, the Court would grant damages to the plaintiff. The plaintiff had not been in the habit of granting licences, but had been the sole manufacturer of the capsules.

Willcock, Q.C., T. H. Terrell, and Webster, for the plaintiffs, contended that justice would not be done except by damages being given, because a mere account of profits was no measure of the injury done to the plaintiff, inasmuch as the defendants might have been selling at a low price in order to injure the plaintiff's market, and thus the smaller the amount of profits the greater the injury to the plaintiff. They referred to,

Hills v. Evans, 31 L. J. 457;

Phelps v. Prothero, 25 L. J. 105;

The Chancery Amendment Act, 21 & 22 Vict. c. 27, s. 2;

The Chancery Regulation Act, 1862, 25 & 26 Vict. c. 42.

They also contended that the defendants, the directors, had rendered themselves personally liable at least for the costs of the suit.

Roll, Q.C., Haddan, and Macrory, cited, contra,

Needham v. Oxley, 2 N. R. 388;

Johnson v. Wyatt, 9 Jur. (N. S.) 1333.

They also contended, that it was the universal practice to make some of the directors of a company parties to a suit for the purpose of discovery; and that this purpose alone justified their being made parties: but that they were not to be held liable individually for the acts of the company.

Willcock, Q.C., in reply.

WOOD, V.-C., said, that as to the question of damages, he considered that the Court had jurisdiction; but, that, where, as in the present case, no licences for the use of the patent had been ever granted, it was impossible to arrive at any satisfactory conclusion as to the amount of damages from

the very vague and guess-like data afforded by the facts: and he considered that only a number of men accustomed to business, such as jurymen would be, could at all estimate such amount; and even in that case, there was considerable uncertainty. He should, therefore, follow the precedent of *Hills v. Evans* (*loc. cit.*), and give the plaintiff the option of bringing an action at law to recover damages, or of taking an account of profits in this Court.* As to the liability of the directors, he thought that, in what they had done, they had acted with their eyes open; and that the fact of their having been agents of the company, did not relieve them from the responsibility attending their conduct. He held, that they were personally liable to pay the costs.

*Note.**—The actual order made in *Hills v. Evans* (*loc. cit.*) was for the usual injunction; and for an account of the profits made by the defendants, through using the plaintiff's patent, "and of such other compensation as is fit to be awarded to the plaintiff in respect of such making, use, and exercise;" see Reg. Lib. A., 1862, p. 293. The order is silent as to an action at law, and its words would appear to imply damages.

Wood, V.-C. { EAST PANT DU UNITED LEAD
2, 5 Dec. 1864. { MINING COMPANY v. MERRY-
WEATHER (2).

*Practice—Bill Filed in Name of Company—
Majority—Disputed Votes.*

At a meeting of shareholders, held to consider whether the company should adopt a suit instituted in the name of the company, there would have been a majority in favour of adopting the suit, but for the votes of a shareholder, whose title to his shares depended upon the validity of the transaction which the suit sought to set aside:—

Held, that the shareholder was entitled to vote, and that the bill must be taken off the file:

Semble, that under such circumstances, an individual shareholder might, notwithstanding Foss v. Harbottle, 2 Hare, 461, institute a suit in his own name, to set aside a transaction, which the company was competent to confirm.

This case is reported 4 N. R. 541, upon a motion made last August, to take the bill off the file, as having been filed without the authority or consent of the company.

The Vice-Chancellor then held that, under the circumstances, the proceedings ought not to be stopped until the shareholders had had an opportunity of deciding whether they should be adopted by the company, and with that view ordered the motion to stand over till Michaelmas Term.

A meeting of the shareholders was afterwards held, at which a resolution adopting the suit as the suit of the company was proposed. This was met by an amendment providing that all proceedings in the suit should be discontinued, that all differences between the shareholders and the defendant Merryweather

should be referred to arbitration, and that the costs of all proceedings in the suit should be in the discretion of the arbitrator.

Upon a poll being taken, this amendment was carried by a majority of 390 votes, representing 1,490 shares for the amendment, against 324 votes, representing 1,070 shares for the original resolution; but the majority included 78 votes given by Merryweather, in respect of 600 shares received by him under the contract impeached by the bill.

Roll, Q.C., and C. Hall, now renewed the motion to take the bill off the file.

Sir H. Cairns, Q.C., and Kay, in opposition to the motion, contended,

1st. That Merryweather's votes ought not to be taken into account. The articles of association (see 4 N. R. 541) prevented a director from voting upon a contract in which he was interested, and this applied to his voting as shareholder as well as to his voting as director. The shares in respect of which Merryweather voted, had been acquired under the contract which was now impeached, and this contract, being one which the company was competent to enter into, could only be set aside in a suit instituted in the name of the company,

Foss v. Harbottle, 2 Hare, 461;

Mouley v. Alston, 1 Ph. 790.

The admission of his votes therefore left the majority of the real shareholders without a remedy.

2nd. That the present motion was inconsistent with the amendment adopted by the meeting, which provided that the proceedings were to be stayed, not that the bill was to be taken off the file.

They admitted that they had no retainer under the seal of the company.

Bird, and Jessel, for certain of the directors, asked that their costs might be provided for.

Roll, Q.C., in reply.

The clause in the articles as to a director not voting, only applied to his voting as a director.

If the argument on the other side were to prevail, a minority of shareholders might always file a bill in the name of the company, provided the allegations of their bill excluded a sufficient number of the other shareholders from voting upon the question whether the bill should be adopted.

As all the shareholders would have to contribute to the expenses of the suit, instituted in the name of the company, a minority ought not to be allowed to impose this liability on a dissentient majority.

The terms of the amendment were immaterial. It had disposed of the original resolution, and prevented the adoption of the bill by the company.

5 Dec. 1864.

Wood, V.-C., said, that this was a motion to take a bill off the file as improperly filed in the name of a company, without any authority for that purpose. It

had admittedly been filed without any retainer under the seal of the company, but when the motion was first brought before him, it appeared that a great number of shareholders shared the views of those who had filed the bill; and that owing to the board of directors being equally divided, the company was without a head. Under these circumstances he thought it desirable to give the company an opportunity of expressing its opinion upon the suit, in a regular manner. A meeting had since been held with this singular result, that the resolution adopting the suit was lost, and an amendment carried, by a majority so small that Merryweather's votes turned the scale. Under these circumstances, the question he had to ask himself was, whether the company had now given their sanction to the suit. The only mode in which the conclusion that they had done so could be arrived at, was by discarding Merryweather's votes, but that would amount to a decision of the suit itself. It had been argued, that Merryweather's votes, whether good or bad, could not be admitted upon a question in which he was interested, but the portion of the articles of association relied upon clearly only referred to directors voting as directors. It had no reference to general meetings of the whole body of shareholders. At such meetings, shareholders were always left at liberty to vote, and usually did vote according to their interests. At meetings of the directors on the other hand, the directors were exercising powers of which they were only trustees. It had further been said, that if Merryweather's votes were allowed to prevent the institution of a suit in the name of the company to impeach the transaction by which he became a shareholder, the shareholders who objected to the transaction would be unable to obtain any redress. But notwithstanding *Foss v. Harbottle* (*loc. cit.*), he considered that there was no doubt that the Court would allow shareholders to take proceedings in their own names, where it appeared that they were prevented from filing a bill in the name of the company by the votes of the very shareholders whose shares they alleged to have been improperly obtained; but this was not a ground for allowing them to file a bill in the name of the company. He should not make any order as to the costs of the motion. That would come before the arbitrator, if the amendment were acquiesced in. He must leave the parties to take their own course. He, of course, could not say what decision the Court would come to upon a bill filed by the dissentient shareholders. The order would simply direct the bill to be taken off the file.

Wood, V.-C.) *Re HURLE'S SETTLED*
5 DEC. 1864.) ESTATES.

Practice—19 & 20 Vict. c. 120, ss. 14, 23,
26, 29.

The power given to the Court by the 14th section of the Leases and Sales of Settled Estates Act, is not

incident to the grant of a power of leasing under the Act, but can be exercised independently of it.

The Court has no power to direct that the expense of the construction of roads, authorised under the 14th section, shall be defrayed by a sale or mortgage of any part of the settled estate under the 29th section.

Re Chambers (28 Beav. 653), followed.

But semble, a fund of personally in Court, held upon the same trusts as the settled estate, can be so applied.

When the settlor has declared that the estate shall not be leased or sold until the happening of a future event, the Court will not, merely to save expense, make a prospective order :

Semble, that the relative weight to be attached to the expression of intention in the settlement, and to extrinsic evidence under the 29th section, is the same whether the settlement came into operation before or after the passing of the Act.

John Hurle, by his will, dated in 1853, devised his freehold residence at Clifton to his wife, Mary Hurle, for her life without impeachment of waste, and devised all other his estates at Clifton to the use that his wife should receive an annuity of 400*l.*, and subject thereto, and to his wife's life estate in the dwelling house, he gave all his property at Clifton to the use of his nephew, the petitioner, for life, with remainder to the petitioner's first, and other sons in tail male; and the testator declared that it should be lawful for the petitioner during his life (but nevertheless during the life of the testator's wife, only with her consent in writing for that purpose obtained), to demise, grant, release, or otherwise assign for any term of years, any part of the testator's freehold land, devised to the petitioner for life, such appointments, &c., to operate as though the petitioner were tenant in fee simple of such lands; and for enabling the petitioner to effect such purposes (but nevertheless during the life of Mary Hurle, with her consent as aforesaid) the testator declared that the petitioner should have all such further and other powers and authorities as were in like cases given under settlements and wills, as though the same were therein set forth.

The estate at Clifton comprised about thirty-five acres of land, the residence being situate on the eastern edge of the property.

In 1841, the testator had conveyed a portion of the property on the north side for building purposes, reserving fee-farm rents, and a row of houses called Apsley Place was then built. Several years before his death the testator had put up a notice-board, on part of a field adjoining Apsley Place, stating that the land was for sale for building. This board remained until after the testator's death, and there was evidence that he had frequently expressed his desire that the row of houses in Apsley Place should be completed.

The testator died in 1855, and after his death, the

petitioner endeavoured to obtain Mrs. Hurle's consent to grant building leases, by which, it was asserted, the rental of the property would be raised, from a little more than 400*l.* a-year to nearly 2000*l.* a-year. Mrs. Hurle, however, refused to give such consent, and, in April, 1864, wrote to the petitioner, to say, that her determination not to permit any building on his land, at Clifton, was quite unalterable.

Thereupon the present petition was presented, under 19 & 20 Vict. c. 120, praying that, subject to, and so as not to affect the right, estate, or interest of Mrs. Hurle in the settled estate, such parts of the estate as the Judge should approve might be sold, or let, for building purposes, at fee-farm rents, or for long terms of years; and that, in approving of the portions of the settled estate to be so sold or demised, such parts only might be disposed of, during the life of Mrs. Hurle, as might be built upon without injury or annoyance to the occupier of the dwelling-house: that roads, &c., might be laid out on the settled estate; and that the costs of the present application, and the expenses which should from time to time be incurred in making the roads, &c., might be raised by a sale of part of the settled estate.

The roads proposed to be made were laid out entirely with a view to future building, except a short road giving a more direct communication from Apsley Place to the main road.

E. F. Smith, and *Beck*, in support of the petition, argued—

1st. The intention of the will was not to give to Mrs. Hurle the power of arbitrarily refusing her consent; but only a fair discretion, to be *bond fide* exercised to protect her residence from injury or annoyance.

2nd. A distinction was to be drawn, as to the effect of an expression of intention, between wills which came into operation before and after the passing of the Act. And in the present case, there was strong extrinsic evidence, that the testator intended the land, or some of it, to be built upon.

3rd. The Court was empowered, by the 14th section of the Settled Estates Act, to direct streets, roads, &c., to be laid out; and the expense of constructing such roads ought to be defrayed by a sale or mortgage of a portion of the estate, under the 29th section of the Act. On this point they cited the decision of *Stuart V.-C.*, in

Re Gilbert, 15 Nov. 1862 (unreported); which was opposed to

Re Chambers, 28 Beav. 653.

If the Court should refuse to order the roads to be laid out immediately, they asked, in order to save the expense of another application, for an order that roads might be laid out, with Mrs. Hurle's consent, during her life, with liberty to apply in Chambers for that purpose.

Roll, *Q.C.*, and *J. Pearson*, for Mrs. Hurle, said, that in *re Gilbert* a power of leasing had been vested

in trustees by a previous order. They argued, that the power given to the Court, by the 14th section of the Act, to authorise the making of roads, &c., could only be exercised in aid of, and in addition to, the primary objects of the Act, as expressed in the preamble—viz., the authorising leases or sales of settled estates.

W. D. Evans, and *Upton*, for trustees and an infant tenant-in-tail.

WOOD, *V.-C.*, said, that, whether the will came into operation before or after the Act, the Court must look to the testator's intention. The petitioner and Mrs. Hurle claimed under the same will; and by the terms of it, the petitioner was unable to grant building leases without Mrs. Hurle's consent. Mrs. Hurle's power to consent was not a bare power, such as might be given to a surveyor, or some other uninterested party, merely to protect the property against injurious building,—in which case the Court might interfere, under special circumstances; but it was a power to be exercised by a person who had also an interest in the property.

He must, therefore, dismiss with costs so much of the petition as related to the making of a prospective order, to be put in force on the consent or death of Mrs. Hurle: for, when the event happened, the circumstances of the case might be altered.

The question of the roads was different. As to selling any part of the settled estate in order to make roads, his Honour would follow the decision of the Master of the Rolls in *Re Chambers* (*loc. cit.*), a decision in which he himself concurred. In that case, as reported, no allusion was made to the 23rd section of the Act. It was, however, to be observed that the Act contained two distinct sets of clauses, one relating to making roads, and the other to leases and sales; the 23rd section of the Act did not authorise the application of moneys arising from sales to the making of roads; nor would the words in the 29th section, "expenses of and incident to any application under this Act," authorise such an expenditure. In *re Gilbert* there was a fund of personalty in Court held on the same trusts as the settled estate, and Vice-Chancellor Stuart applied this fund in making roads for the improvement of the property, but the fund had no reference to the Act, except that it was settled on the same trusts as the land ordered to be sold or leased under the Act.

The petitioner might, if he pleased, make the proposed road to Apsley Place at his own expense: it was clearly for the benefit of the property, and his Honour could not assent to Mr. *Roll's* argument, that the power given to the Court by the Act to authorise the construction of roads was incident to the granting of a power of leasing under the Act, for it was obvious that there might be many cases in which it would not be desirable to do anything more than authorise the

making of roads. As to the other proposed roads, no good reason had been shown for authorising their construction.

Minute.—Liberty to the petitioner to make the proposed road to Apsley Place at his own expense, and to dedicate it to the public or not. Dismiss the rest of the petition, with costs to be paid by the petitioner. Tax the costs and expenses of all parties as between solicitor and client of and incidental to the petition, so far as not dismissed, and the extra costs of the trustees of the petition so far as dismissed, and declare the same a charge upon the settled estate. Liberty to apply in Chambers to have the amount raised.

Note.—*Re Gilbert* was an unopposed petition, but

the case of *Re Chambers* was cited to the Vice-Chancellor.

The following is an abstract of the order made in it, so far as is material to the present case :—

Order that such parts of the settled estate as the Judge shall approve, be from time to time laid out, with the approbation of the Judge, for streets, roads, &c. (either to be dedicated to the public, or not), by the trustees for the time being of the power of leasing granted by the previous order, and that the expense of making such streets, roads, &c., be defrayed by the trustees of the residuary personal estate of the testator out of such residuary estate, the same being held upon the trusts to which the said settled estates are subject.—Reg. lib. 1862, A fol. 2482.

COMMON LAW.

Q. B.) REGINA v. THE JUSTICES OF THE
22 Nov. 1864.) BOROUGH OF RYE.

Divided Parish—Churchwardens—Overseers—
3 & 4 Will. 4, c. 90, s. 38.

Where part of the parish of R was within and part without the borough of R, and churchwardens were elected for the whole parish, but separate sets of overseers for each part (the division not being under 13 & 14 Car. 2, c. 12):—

Held, that the churchwardens were "overseers" within 3 & 4 Will. 4, c. 90, s. 38 (The Lighting and Watching Act).

A rule had been obtained calling upon certain Justices of the Borough of Rye to show cause why a *mandamus* should not issue, commanding them to issue a distress warrant against the goods and chattels of A, B, C, and D, overseers of the poor of the parish of Rye, part whereof lies in the Borough of Rye, [for the payment of 85*l.*, part of a rate of 135*l.* levied for the lighting, &c., of the borough.

The parish of Rye is more extensive than the borough, and that part of the parish which is outside the borough is called "the Foreign of Rye." Each year two overseers are appointed for that part of the parish which lies within, and two for that part which lies without, the borough. Two churchwardens are annually chosen for the whole parish. About Easter, 1863, A and B were so appointed churchwardens for the whole parish, and C and D overseers for the part of the parish within the borough, and about Easter, 1864, they were so re-appointed. In 1846 the Town Council of Rye, under 5 & 6 Will. 4, c. 76, s. 88, and

3 & 4 Will. 4, c. 90, ss. 32-38, took upon themselves the duties of inspectors for the purpose of lighting the borough, and until 1857 they directed their orders for levying the gas and lighting rates by inadvertence to "the collector of rates for the time being of the parish of Rye." After 1857 the orders were addressed "to the overseers of the poor of the parish of Rye, part whereof lies in the borough of Rye," and in September, 1863, an order thus directed was made to levy a sum of 135*l.* for lighting the borough. A, B, C, and D accordingly made the rate, and the collector collected part of this sum, but died insolvent, leaving 85*l.* still unpaid and due to the Town Council. A, B, C, and D, as "overseers of the poor of the parish of Rye, part whereof lies within the borough of Rye," were summoned before the said Justices to pay the said 85*l.*, and the Justices dismissed the summons.

Lush, Q.C., and F. M. White, now showed cause.

1st. It did not appear that the rate for 135*l.* did not "exceed the rate of sixpence in the pound on the full and fair annual value of all property rateable to the relief of the poor," to which 5 & 6 Will. 4, c. 76, s. 88, limits the rate,

Morell v. Harvey, 4 Ad. & E. 684.

2nd. A and B are churchwardens, and not liable as overseers. Churchwardens have not power to collect rates, and are not mentioned in 3 & 4 Will. 4, c. 90, s. 38, which enacts that "overseers" may be distrained upon, and the word "overseers" does not there include churchwardens. This is clear from ss. 37 and 77. Further, under 54 Geo. 3, c. 91, overseers are appointed on the 25th of March, or fourteen days after, while churchwardens are appointed in

Easter week, or within one month after. Hence, churchwardens and overseers may respectively go in and come out of office at different times; this would create confusion under 3 & 4 Will. 4, c. 90, s. 35. Their respective duties are also quite distinct, 3 & 4 Will. 4, c. 90, ss. 9 and 12. When, as here, the parish is divided, the churchwardens cease to be overseers *ex officio*,

Rex v. Nantwich, 16 East, 223;

Rex v. Justices of North Riding of Yorkshire, 6 Ad. & E. 863;

13 & 14 Car. 2, c. 12, s. 21.

Such a division is sanctioned by 59 Geo. 3, c. 95.

Borill, Q.C., supported the rule.

COCKBURN, C.J.—I think the rule must be made absolute. It appears that this order was properly made for levying a rate, but it was not obeyed. It is true that this arose from the default of the officer employed to collect the rate after it was made by the churchwardens and overseers. It is very hard that they should suffer for his default; but some one must pay the money; if they do not, nobody will. The money not being forthcoming, the 38th section of 3 & 4 Will. 4, c. 90, says that the Justices shall issue their warrant for levying the amount by distress and sale of the goods of all or any of the overseers.

An objection is raised that it did not appear that the rate was within the limit of sixpence in the pound. Now, there is a well settled rule in this Court, that when a rate is made by proper authority, the Justices have no judicial functions—their duty is only to see that the rate is made on the right person. They have nothing to do with its validity, they have merely a ministerial duty to perform.

Next it is said, that the order is sought to be enforced against the churchwardens as part of the overseers, and that churchwardens are not overseers of the poor. It is very true, that, under this Act, the churchwardens have certain duties, distinct from the overseers; yet it does not follow that, for other duties imposed by the Act, churchwardens are not to be included within the term "overseers." Churchwardens are specially named in 43 Eliz. c. 2, to be among the overseers; and unless there is something here to show that they were not intended to be included in 3 & 4 Will. 4, c. 90, s. 38, we must give to the word the interpretation which the law gives to it. What is there here to take it out of the usual course? It is urged, that there is enough in the fact that this parish is divided into two parts, one being in the borough, the other in the county; and that the rates would have to be allowed by Justices of the borough for the one part, and by Justices of the county for the other: the overseers being separately appointed for the two parts, while the churchwardens are the same for the entire parish. Authorities have been cited to show that where parishes are divided, under the statute of Charles 2, the churchwardens cease to be overseers *ex officio*. But it does not appear that this parish was

divided under any such Act. Nor does 59 Geo. 3, c. 95, affect the case. Here the churchwardens, though appointed for the whole parish, have acted as overseers of the poor for each division in respect of poor-rates; and in reference to this very rate they have acted as overseers. There is nothing, therefore, to show that they are not overseers in the ordinary acceptation of the term; and the order being made against the overseers and the churchwardens, the latter must take their share with those who are, in the narrower sense, overseers.

CROMPTON, J.—I am of the same opinion. As to the first objection, it is well settled, that if a rate is good on the face of it, the parties cannot contest the validity of it before the Justices. The only point about which I felt a difficulty was, as to the churchwardens being appointed for the whole parish, and the overseers being distinct for each division; but this case is not within the principle of the authorities cited. I do not think there is any reason shown why the Justices ought not to issue their warrant. These churchwardens are *de facto*, and I see nothing to show that they are not also *legally*, overseers.

MELLOR and SHEE, JJ., concurred.

Rule absolute.

Q. B. } THE GREAT WESTERN RAILWAY
28 Nov. 1864. } COMPANY v. BAILIE

Conviction—Incorrect Weighing-machine—5 & 6 Will. 4, c. 63, s. 28.

On a conviction of a railway company, under 5 & 6 Will. 4, c. 63, s. 28, for having in their possession a weighing-machine found by the inspector to be incorrect, it was proved that the machine was fitted with a moveable index working on a dial plate on which were figures from 0 to 560, and that owing to such index being out of order, four pounds more than the true weight was shown on each occasion that the machine was used. This defect was known by the servants of the company, and an allowance of four pounds was always made to the customer:—

Held, that, although such allowance was made, the machine was "incorrect" within section 28.

The London and North-Western Railway Company v. Richards (2 B. & S.), distinguished.

This is a case stated by the undersigned two Justices of the Peace in and for the county of Northampton under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of this Court on questions of law which arose before us, as hereinafter set forth.

At a Special Sessions, holden at the police-office in Brackley, in and for the division of Brackley in the said county, on the 14th day of December, 1863, a complaint was preferred by the respondent, being the inspector of weights and measures for the said division, against the appellants, under the 5 & 6 Will. 4, c. 63, s. 28, and charging that they did, on the 5th of October, 1863, at Aynhoe in the said county, unlaw-

fully have in their possession at their station there situate, and whereat goods were weighed for conveyance or carriage, a certain weighing-machine which was there found by the respondent to be incorrect and unjust.

The appellants were convicted by us and fined, but being dissatisfied with our determination duly applied to us, pursuant to the said first-mentioned statute, to state a case for the opinion of this Court, and duly entered into a recognisance, as required by the statute.

Now, therefore, we the said Justices do hereby state and sign the following :—

Upon the hearing of the complaint it appeared that the machine in question was that in use on the platform in Aynhoe station for weighing parcels and passengers' excess luggage, all of which were weighed thereby.

That sixpence was the lowest price charged, and that, for example, from Aynhoe to London for fourteen pounds was tenpence, with an increase of threepence for weights above fourteen pounds and under twenty-one pounds. That the machine worked by a spring, and had a dial plate and index finger with figures from "zero" to 560 pounds, by which the weight was ascertained.

That the machine had been injured and out of order for a fortnight before the day of complaint, and that the index stood at four pounds instead of "zero," whereby, unless the four pounds were allowed for, there would be a loss of that weight to the customer or passenger in every case, but it was asserted by the station-master that this allowance had been directed to be made by the porter who was in the habit of weighing the goods.

If however a porter, who was not aware of such orders and did not notice the defect, were to weigh the goods, the result would be wrong.

The station-master proved that he could not rectify or adjust the machine to remedy the defect, and said that it could not be so rectified at the station, and that he had no means of doing it, but that the machines were inspected by the manufacturer every three months. The manufacturer, who contracted with the company, was to inspect the machines and keep them in order, and to attend at any time when he had notice that a machine was out of order. The manufacturer, however, was called, and admitted the machine was out of order, and said that it could be adjusted by means of a pin, which method he explained. It was also proved that no notice to the manufacturer to adjust the machine had been given until after the complaint had been made by the respondent.

The appellants contended that it was the duty of the respondent, before proceeding to examine the machine, to have taken steps to adjust it in the method spoken of, or at any rate to start from the weight of four pounds indicated by the finger, and deduct such amount from the apparent weight,

and that the machine with such precautions was not incorrect or otherwise unjust within the meaning of the statute. The respondent contended that the facts above stated justified a conviction, the machine being admittedly in part incorrect, and, without the allowance being made, unjust, and that the argument of the appellants might be used in support of an ordinary scale ascertained to be faulty, and the same allowance made, or in case of a weight proved to be light, and which the weigher corrected by allowing the deficiency. Also, that upon the facts no rectification could be effected by the persons who were using the machine for the purpose of weighing, or by the respondent at his visit, and that for all purposes the machine was in gear, and fit to be used but for the four pounds shown against the customer as before-mentioned, which required mental correction.

The question for the opinion of the Court is, whether, upon the above facts, the appellants were liable to be convicted under the terms of the section named.

If the Court should be of opinion that they were so liable, the conviction to stand, if otherwise, the conviction to be quashed.

Given under our hands, &c.

(Signed).

The following are the points intended to be insisted on by the appellants on the argument of the case which has been stated herein :—

1st. That inasmuch as the alleged inaccuracy in the said weighing-machine could have been prevented by adjustment, the respondent ought to have so adjusted, or endeavoured to have had it adjusted, before proceeding to his said examination.

2nd. That in his said examination the respondent ought to have used the same precaution, and adopted the same mode of weighing and calculating the weights which were invariably used and adopted by the appellants.

3rd. That there was no proper examination of the said machine preliminary to the said proceeding against the appellants.

4th. That the said conviction is bad, inasmuch as the said machine was and is correct and just when used in the mode and with the precautions invariably adopted by the appellants when the said machine was used at their said station.

5th. That the said statute does not apply, inasmuch as the alleged defect in the machine was obvious and apparent to the public, and had been caused by an accident, and the said machine was continued in use merely till such defect and injury could be repaired, and was used only with certain precautions, and in a way which insured all goods being weighed correctly and justly.

6th. That the said machine was not incorrect or otherwise unjust, nor found to be so on the said examination thereof within the true intent and meaning of the said statute.

The peculiarity of the machine in the present case was, that in ascertaining the weight of any subject submitted to be weighed counter weights are not used as in an ordinary scale, but the weight of the subject is ascertained by a mechanically applied resisting power which accurately measures the weight necessary to overcome it. In addition to this is used a dial-plate with engraved figures from 0 to 560, with a moveable index so adjusted as to move in accordance with the pressure or weight brought to overcome the resisting power. In this case the operation of the weighing power upon the moveable index or the dial-plate was faulty. In order that the dial-plate shall indicate accurately the weight of the thing weighed, the index ought when the machine is at rest to point to 0; but owing to the machinery being slightly out of order, it pointed at 4 instead of 0, and thus indicated the weight of any given object by four pounds too much. But if the starting point were taken from 4 instead of 0, the difference between 4 and the figure indicated on the dial-plate by the pressure of the article weighed would give the correct weight.

Cave, in support of the conviction.

The case is within the Act of 5 & 6 Will. 4, c. 63, s. 28, for the machine was upon examination "found to be incorrect" within the meaning of that section. The case of

The London and North-Western Railway Company v. Richards, 2 B. & S. 326, is distinguishable, for there the weighing-machine was liable to atmospheric variation, and required adjustment when used.

Hayes, Serjt. (*Digby* with him), for the appellants.

A mere temporary incorrectness is not within the meaning of section 28 of the 5 & 6 Will. 4, c. 63, the incorrectness must be permanent, and must involve an injustice.

[MELLOR, J.—Were it merely accidental, I should agree with you; but the company knew of the machine being out of order, and there ought to be some one on the spot skilful enough to put it in order.]

By the terms of the Act, the mere possession subjects to a penalty; but a temporary incorrectness is not within the Act—there must be a substantial error involving injustice.

[MELLOR, J.—"Light" is the word used in the Act, and that does not mean fraudulent. No one would suppose that a great company would have a fraudulent machine; but the public use it, and have a right to have it correct.]

The company sends it to the maker to be repaired as soon as they can, and are they to be subject to a penalty in the interim? The words of the Act are "incorrect, or otherwise unjust." This means that the machines must be normally or permanently incorrect, and a mere temporary derangement is not within the Act, otherwise this would be the case, that when a complicated machine gets out of order, which it is very

liable to do, there would be no means of escaping the penalty.

CROMPTON, J.—This conviction must be affirmed. This case is different to the one cited in the course of the argument. The incorrectness is clearly not a "moral" wrong. The object of the Act of Parliament was to have a machine which will not show a wrong result, in order that parties who are careless may not have the option of doing wrong. Now here, evidently there was an incorrect weighing-machine, which, though incorrect, it may be said, might be made right, just as in every case you may adjust a weight by putting additional weight on the other side; but this was the very thing intended to be prevented by the Act, which means to say, you shall not put it in the power of your servant to do injustice. This case is very different to the former case in *2 Best & Smith*, where the machine was subject to atmospheric variation.

In this case no man was to use the machine without adjustment. There was no variation which was likely to occur often, but the machine had sustained an injury several days before—an injury which made the machine out of order and incorrect, to the knowledge of all the servants of the company: but notwithstanding they continued to use it. Upon these grounds I think the conviction was right.

MELLOR, J.—I am of the same opinion. My brother Crompton has clearly distinguished this case from that in *Best & Smith*, and I agree with him. The object of the statute was, that whoever used weighing machines, weights, or scales, should not have them incorrect, and this machine was out of order for several days. No one supposes an improper or fraudulent use was made of it while it was in that condition, but it was allowed to be used, and that was within the Act.

SHEE, J., concurred.

Conviction affirmed.

Q. B. } REGINA v. THE JUSTICES OF
28 Nov. 1864. } SALOP.

Assistant Overseer, Election of—Notice.

It is a sufficient publication of a notice for the meeting of parishioners to appoint an assistant overseer, if it be affixed on the door of the principal church of the Established Church within the parish, in which divine service is performed, without publishing it on the doors of the dissenting chapels.

Where a party elected under 59 Geo. 3, c. 12, was appointed assistant overseer by the warrant of Justices, and the minutes of the vestry-meeting at which he was elected did not specify the duties to be performed by him:—

Held, that the resolution of the vestry must be construed that he was to perform all the duties of assistant overseer, and that the Justices' warrant appointing him to perform those duties was right.

A notice for a meeting of the parishioners of the parish of Cainham, in the county of Salop, to appoint an assistant overseer, and for other business, without specifying his duties, or the salary he was to receive, was fixed on the door of the parish church, but not on the doors of two dissenting chapels in the parish. The assistant overseer was elected, but the minute of the appointment in the vestry-book did not specify the duties he was to perform. A warrant was afterwards made by Justices in Petty Session for his appointment as assistant overseer to perform all the duties of an overseer.

Dowdeswell obtained a rule, calling on the Justices of Salop to show cause why a *certiorari* should not issue to bring up the warrant for the appointment of assistant overseer, to quash it on the grounds—

1st. That the notice was insufficient, as it was not posted on the doors of the two dissenting chapels—the statute requiring it to be fixed on every church and chapel in the parish.

2nd. Because the notice did not specify the duties the assistant overseer was required to perform.

3rd. The minutes of the meeting did not agree with the warrant.

F. J. Abbott now showed cause.

As to the 1st point,

Ormerod v. Chadwicke, 16 M. & W. 367, applies.

[*Dowdeswell*.—The first point I give up.]

As to the 2nd point. The notice was sufficient for any man of reasonable understanding. The Act of Parliament is not imperative as to specifying the duties of an assistant overseer, but permissive, and it must be taken that, if the duties are not limited in the notice, it is to be understood that he is to perform all the duties.

As to the 3rd point,

Skingley v. Surridge, 12 L. J. M. C. 122, is expressly in point. Also,

58 Geo. 3, c. 69, s. 1;

59 Geo. 3, c. 12, s. 1;

7 Will. 4 & 1 Vict. c. 45, s. 2.

Dowdeswell argued in support of the rule.

CROMPTON, J.—This rule must be discharged. The first point was given up; the second was idle; and the third is decided by the case cited by Mr. Abbott.

Rule discharged.

Q. B. } REEVE v. WOOD.
28 Nov. 1864. }

*Evidence of Wife—Personal Injury to—
Desertion.*

A wife is not admissible as a witness to prove the desertion of the husband, by which she became chargeable to the parish.

Case stated for the opinion of the Court of Queen's

Bench, at the instance of the informant, pursuant to 20 & 21 Vict. c. 43, as follows :—

At a Petty Sessions of the Peace, holden in and for the City of Worcester, the 18th of July, 1864, before us the undersigned (Justices of the Peace), Charles Wood appeared before us, {charged in and by a certain information laid by the said Thomas Sutton Reeve, by direction and in pursuance of an order of the Board of Guardians of the Worcester Union in said city, to him directed in that behalf; “for that he the said Charles Wood, at the parish of St. Helen in the said city of Worcester, on the 23rd of June last past, being then and there a person able wholly or in part, by work or other means, so to do, did wilfully neglect and refuse to maintain his lawful wife Mary Ann Wood, and their three children, namely, Agnes Wood, aged about five years and eight months, Emily Wood, aged about four years and two months, and Walter Wood, aged about two years and one month, by reason of which neglect and refusal as aforesaid she the said Mary Ann Wood and her said three children did, on the day and year aforesaid, become chargeable to the common fund of the said Worcester Poor-Law Union in the city aforesaid, and had continued and were then so chargeable to the said common fund of the Worcester Union, contrary to the statute in such case made and provided;” and the said charge having been duly heard by us, we dismissed the said information, upon the grounds and for the reasons hereinafter stated; and whereas the said Thomas Sutton Reeve hath, pursuant to the provisions of the above-mentioned statute, given us notice, and required us to state and sign a case, setting forth the facts and grounds of our determination upon the hearing of the said information, in order that the opinion of the said Court of Queen's Bench might be taken thereon, now we the said Justices, pursuant to the said notice and the provisions of the said statute, do hereby state and sign such case accordingly.

At the hearing of the said information, in order to prove the offence with which the defendant was charged as before mentioned, and more particularly the marriage, and neglect and ability to maintain as alleged, it was sought to examine the wife of the defendant upon oath, and she was tendered as a witness for that purpose by the attorney for the informant. The defendant thereupon objected that the evidence of his wife was not admissible against him, on the ground that the offence with which he was charged was of a criminal nature. It was argued, on the part of the informant, that although the defendant was charged under the Vagrant Act (5 Geo. 4, c. 83), with a criminal offence, punishable by imprisonment, still the case should be treated as a personal wrong to the wife: and the almost certain impossibility to prove in detail all the facts necessary to constitute the offence without such evidence, was forcibly dwelt upon as a further reason why it should be admitted. The case of

Sweeney v. Spooner, 32 L. J. (N. S.) M. C. 82,

was referred to, but it did not appear to contain any express decision upon the point in question.

We the said Justices, having heard the said arguments, and having considered the words of the statute (14 & 15 Vict. c. 99), were of opinion that the offence consisted in the chargeability to the Union, that the punishment is provided for that offence, and not for an alleged wrong to the wife, and therefore that the evidence of the wife could not be received as against her husband, and that the said objection made by the defendant must prevail, and we allowed the same accordingly, and discharged the said defendant, &c. &c. Given under our hands, &c.

(Signed).

Points for argument on part of the appellant :

1st. That the evidence of the wife of the respondent was, on the hearing of the said information, improperly rejected.

2nd. That the fact of the respondent's having run away from the parish, under the circumstances stated in the case, would (if true) constitute a personal wrong to his wife and children; and the information could not properly be deemed a criminal proceeding, within the true meaning of the statute, 14 & 15 Vict. c. 99, s. 3.

Henry Matthews, for the appellant.

Leaving a wife without a home, and to the mercies of the parish-officer, is a personal injury to the wife, so as to admit her evidence. This point was raised in

Sweeney v. Spooner, 32 L. J. M. C. 82;

Wakefield's Case, 2 Lew. C. C. 1;

1 East, Pleas of the Crown, 445;

4 Phil. & M. 8;

1 Deacon's Crown Law, 399.

It is the practice, according to Mr. Phillips, in his work on Evidence, vol. i. 82, to admit the wife's evidence in these cases.

[*West, amicus curiæ*.—For some time past the contrary has been the practice at the West Riding Sessions.]

2nd. If the case is not within the rule as to personal injuries to the wife, it is within the rule of necessity: for no one but the wife could know the husband's wrong.

Ree v. Pearson, Andr. 310.

No counsel appeared on behalf of the respondent.

CROMPTON, J.—The decision of the magistrates was right in this case. From the cases, the principle appears to be this: that in cases of personal injury the evidence of the wife was admitted, partly because mischief might result if the wife could not give evidence in the cases of private injuries, and partly from necessity, and partly because she was the prosecuting party. The present case is not within the rule, nor was the injury in the case a personal injury. It is the crime against the parish which makes the man liable. And further, it does not come within any

rule of necessity, as the whole parish might prove the fact of the desertion. What Mr. Phillips says in his book on the subject is surprising; but, from what Mr. West says, it is not the usual practice; I think this was not a case of personal violence, so as to admit the wife's evidence.

BLACKBURN, J.—I am of the same opinion. The general rule is, that the evidence of the wife is not to be admitted in criminal matters, except in cases similar to *Lord Audley's Case*. The principle of the exception is this, that the wife is the only person cognisant of the crime, and if her evidence is not to be admitted, there would be a failure of justice. Cases of abduction have been alluded to, and it is possible there might be cases of that description where no force was employed; but those cases do involve the person, and it might be that the wife was the only person cognisant; and it is a question whether those decisions are right. But this case is not within the rule of personal violence to the wife, and the conviction was right.

MELLOR, J., concurred.

C. P. } POWELL v. BRADLEY.
22 Nov. 1864. }

REGISTRATION APPEAL.

Ten-pound Householder in Boroughs—Age during Occupation—2 Will. 4, c. 45, s. 27—6 Vict. c. 18, s. 40.

It is not necessary that a 10l. householder, who claims to be registered as a borough voter, should have been of full age during the twelve months' occupation required by the 27th section of the Reform Act.

Case stated by the revising barrister for the borough of Kidderminster.

Frederick Bradley claimed to be put on the register in respect of the joint occupation of a foundry and premises in the borough. The said Frederick Bradley, and his brother Samuel Bradley, were in the joint occupation of the said foundry and premises for twelve calendar months next previous to the last day of July, 1864. Frederick Bradley attained the age of twenty-one years in March, 1864. The business at the foundry was carried on under the firm of John Bradley & Co.

The insertion of the name of the said Frederick Bradley in the list of voters, was objected to by Richard Powell, on the grounds,

1st. That, as he was only twenty-one years of age in March of the present year, he could not occupy, as owner or tenant, the said foundry and premises for twelve calendar months previous to the last day of July in the present year.

2nd. That he was not of full age during the whole of the twelve calendar months previous to the last day of July in the present year.

The barrister decided that Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July, 1864; and that Frederick Bradley's minority during a part of the twelve calendar months previous to the 31st of July, 1864, did not of itself constitute a disqualification to his name being retained on the list of voters; and therefore retained his name.

From this decision Richard Powell appealed.

Keane, Q.C., for the appellant.

Previous to the Reform Act no person could be admitted to vote who was under the age of twenty-one years,

7 & 8 Will. 3, c. 25, s. 8.

Then by 2 Will. 4, c. 45, s. 27, "Every male person of full age who shall occupy" premises of the yearly value of 10*l.* is entitled to vote, if duly registered, "provided always, that no *such* person shall be so registered" unless he shall have occupied the premises for twelve months next before the last day of July in that year. The "such person" must therefore be "a male person of full age."

Karslake, Q.C. (Hon. R. Bourke with him), for the respondent.

Before the Reform Act a man could vote at twenty-one; but it is now sought to make the 27th section of that Act a disabling section, so that he cannot vote till twenty-two. The 40th section of 6 Vict. c. 18 (the Registration Act) shows that a man must be twenty-one when he claims to be put on the register; but it is not necessary that he should have been of that age during the whole twelve months of occupation.

Keane, Q.C., in reply.

ERLE, C.J.—I am of opinion that the revising barrister was right. By 2 Will. 4, c. 45, s. 27, every male person of full age, who shall possess a qualification by occupancy, to a certain value within the borough, shall, if duly registered, be entitled to vote, provided "that no such person shall be so registered in any year unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year." That

enactment contemplated that he should be of full age at the time when he claimed to vote, and by the statute that I am about to refer to he must equally be of full age at the time when he claims to be put on the register. The "such person" is the person claiming the vote; and then the proviso says that he must have been twelve months in occupation. But this must be construed with the 40th section of 6 Vict. c. 18, by which Act the peaceful tribunal of the revising barrister is substituted for the old examination at the polling booth. It enacts that the barrister shall expunge the names of persons whose qualification, as stated in the list, is insufficient to entitle them to vote, provided that when a name is objected to, and the objector appears and proves his notices, the barrister "shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters, in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* incapacitated by any law or statute from voting," he shall expunge the name. Therefore, no man can be put on the register till he has the capacity to vote; but we should be extending the Act if we were to say he must be twenty-one years old twelve months before registration.

BYLES, J.—I am of the same opinion. 7 & 8 Will. 3, c. 25, says, that an infant shall not vote, and shall not be elected; and unless we are obliged to do so, we should not extend the term of legal incapacity beyond twenty-one. Then the Registration Act says, that a man must be twenty-one before he claims to be put on the register, and therefore it is absolutely necessary that he should be of full age at the time of registration. Mr. Keane would insert the additional qualification that he must have been of full age during the whole time of occupation. The monstrous consequence would be, that a man could not vote till twenty-two. There is no necessity for such a construction, and the other is the natural one.

KEATING, J., concurred.

Judgment for respondent.

EQUITY.

Lord Chancellor. }
7 DEC. 1864. } *Re BARRON.*

Bankruptcy Act, 1861—Annulling Adjudication of Bankruptcy made on Bankrupt's own Petition—Evidence of act of Bankruptcy—Unstamped Deed.

A deed by which a person assigned all his estate and effects to trustees for the benefit of his creditors, which was neither stamped nor registered under ss. 194, 195 of the Bankruptcy Act, 1861:—

Held, not to be admissible as evidence of an act of bankruptcy.

Semble, where a person has been adjudicated a bankrupt on his own petition, a creditor may present a petition seeking that the bankruptcy may be annulled, and adjudication may be made on the petition of the creditor, provided it can be shown that an act of bankruptcy was committed previous to the filing of the first petition.

In the month of June, 1864, E. G. Barron the younger, being in pecuniary difficulties, endeavoured to make an arrangement with his creditors; and a deed, bearing date the 13th of June, 1864, was executed by him and some of his creditors, by which he conveyed all his estate and effects to trustees for the benefit of his creditors. It was intended that this deed should be registered under section 194 of the Bankruptcy Act, 1861; but the requisite number of creditors could not be procured to execute the deed; and this scheme was abandoned. The deed was never stamped nor registered; and on the 17th of June, Barron was adjudicated a bankrupt on his own petition.

Subsequently a petition was presented to the Court of Bankruptcy by some of the creditors, praying that the former adjudication might be annulled, with the view that Barron might be adjudicated bankrupt on their petition, on the ground of his having committed an act of bankruptcy in executing the deed of the 13th of June, 1864. On the hearing of this petition, Mr. Commissioner Goulburn held that the deed could not be admitted in evidence, as it was not stamped, and dismissed the petition. The petitioners now appealed.

Little, for the appellants, submitted, that though the instrument was not stamped, and could not be received in evidence till it was properly stamped, and

the penalty paid, yet the Stamp Acts did not invalidate it as a deed. He referred to,

5 & 6 Will. & Mary, c. 21;

13 & 14 Vict. c. 97, s. 12.

The proper course would have been, to cause the document to be stamped by the officer of the Court, who would have received the duty and penalty,

17 & 18 Vict. c. 125, ss. 28, 29.*

An assignment of the principal part of the assignor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, though not registered, notwithstanding that it is provided by section 194 of the Bankruptcy Act, 1861, that, in default of registration, such a deed shall not be received in evidence,

Ex parte Wensley, 1 De G. J. & S. 273; s. c. 1 N. R. 183.

Sargood for the bankrupt, and *W. F. Robinson*, for the assignees, were not called upon.

THE LORD CHANCELLOR said, that the present application would have been a reasonable one, if it had been shown that the bankrupt had committed an act of bankruptcy previous to the filing of his own petition. In order to show this, the appellants alleged that the bankrupt had executed an assignment of all his property on the 13th of June, 1864: but, to establish their case, they must show that the instrument in question had operation as a deed previous to the adjudication. Now the deed was not stamped, and the statute of William and Mary enacted, that an unstamped deed should not be available in Law or in Equity. The proposition of the appellants, however, was, that it should be regarded as available as a transfer of property. Further, the Act 13 & 14 Vict. c. 97, s. 12, enacted that no deed should be pleaded or given in evidence, or admitted to be good, useful, or available in Law or in Equity, until the same should be duly stamped. This enactment deprived the Commissioner of the power even to look at its contents till it was properly stamped. It was, therefore, unnecessary to decide, what would have been the effect if the deed had been stamped before it was offered in evidence; it was quite clear that, having been produced as evidence of a conveyance previous to the date of the adjudication, it was rightly rejected by the Commissioner. The appeal must be dismissed with costs.

*Notes.**—See, also, on this point,

12 & 13 Vict. c. 106, s. 51 (unrepealed).

24 & 25 Vict. c. 134, s. 42;

Jemmett's Bank. Acts & Ords. 15, note (1).

Lord Chancellor. } COLLINS v. LAMPFORT.
8, 9 DEC. 1864.

Mortgage of Ship—Rights of Mortgagor and Mortgagee—Contracts of Mortgagor—Merchant Shipping Act, 1854, ss. 70, 71.

Under section 70 of the Merchant Shipping Act, 1854, the mortgagor of a ship retains all the powers of owner, and may enter into any contract respecting the vessel, so long as his dealings do not impair the mortgagee's security.

In September, 1864, one Roberts was the registered owner, and the firm of Lampfort and Holt were registered mortgagees, of the British ship "Maria"; the mortgagees not being in possession. On the 12th of that month, the plaintiffs, Messrs. Collins & Co., chartered the vessel for a voyage from the Tyne to certain ports in Portugal and back. The charter-party was negotiated by one Luccock, and confirmed by Roberts, but the mortgagees were not privy or parties to it.

About the beginning of October, and after part of the cargo had been taken on board the vessel, Roberts became insolvent, and thereupon the mortgagees took possession of the ship, and refused to allow any further cargo to be taken on board, or the intended voyage to be commenced. Whereupon the plaintiffs filed this bill against Roberts, Luccock, and the mortgagees, praying that the mortgagees might be restrained from dealing with the ship in any manner inconsistent with, or which might interfere with, or prevent the execution of, the charter-party. A motion for an injunction in the terms of the prayer was made before Vice-Chancellor Kindersley, and refused.

The mortgagees subsequently sold the ship to one Webb, who had notice of all the previous proceedings in the suit, and was made a party thereto by amendment.

A motion for an injunction was now made by way of appeal from the Vice-Chancellor's decision.

The present report is confined to the question, whether, assuming the charter-party to be binding on Roberts, still the mortgagees might set it aside, and sell the vessel discharged from it, by virtue of the powers conferred on mortgagees of ships by sections 70 and 71 of the Merchant Shipping Act, 1854. These sections are as follows:—

Section 70. "A mortgagee shall not, by reason of his mortgage, be deemed to be owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available for the mortgage debt."

Section 71. "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money."

Glasse, Q.C., and T. H. Terrell, for the plaintiffs.

Section 71 gives validity to all contracts by the mortgagor with respect to the ship, till the mortgagee either sells or takes possession. It would be absolutely impossible in mercantile transactions to search the registry and procure the concurrence of the mortgagee. In

The European and Australian Royal Mail Company v. The Royal Mail Steam Packet Company, 4 K. & J. 676,

Vice-Chancellor Wood laid down, that a mortgagee of a ship had a right to use as well as sell it: this was disapproved of by the Court of Appeal in,

Marriott v. The Anchor Reversionary Company, 3 De G. F. & J. 177;

but there is nothing to show that a charter-party entered into before the time when he begins to use the vessel is not binding on a mortgagee.

Baily, Q.C., and Osler, for the mortgagees.

Section 71 empowers the mortgagee "absolutely to dispose of the ship": if a mortgagee can only sell subject to the charter-party, he cannot absolutely dispose of it. The effect of the enactments in the Merchant Shipping Act is to give the mortgagee a title to the ship discharged from all the engagements of the ship. The mortgagee of a ship is thus in the same position as the mortgagee of lands, who may eject tenants under leases granted by the mortgagor without his concurrence after the date of the mortgage. There is no hardship in requiring persons who deal with the mortgagor to obtain the concurrence of the mortgagee, who can always be found by means of the register.

The object of these enactments is explained in *The European and Australian Royal Mail Company v. The Royal Mail Steam Packet Company (loc. cit.)*;

Dean v. M'Ghie, 4 Bing. 45.

It appears that previous to the Act of 6 Geo. 4, c. 110, the mortgagee was deemed owner of the vessel, and as such liable on contracts entered into with third parties in respect of it. The intention of the Legislature was to remove the liability, not to limit the powers, of a mortgagee.

W. F. Robinson, for Webb.

Glasse, Q.C., in reply.

THE LORD CHANCELLOR said, it was contended that by the Merchant Shipping Act the mortgagee of a ship was empowered to put an end to every dealing by the mortgagor with the vessel subsequent to the date of the mortgage. Such a construction of the Act would be both inconvenient and unjust. If it were adopted, no mortgagor could deal with the vessel in the ordinary way: the mortgagee must be referred to, and his concurrence obtained at every step; and great delay and expense would thus be caused in the transaction of mercantile business. He could not suppose

that the Legislature meant by these clauses to introduce any new course of dealing with respect to ships. The true history of them was no doubt that given in the case of *The European Company v. The Royal Mail Company* (*loc. cit.*), viz., that under the old law the mortgagee was regarded as the owner of the vessel, and the mortgagor as his *quasi* agent; the mortgagee was consequently bound by contracts entered into by the mortgagor, and so came under obligations of a serious nature. The Legislature, desiring to put an end to this liability, did so by interposing a general declaration which exactly hit the *ratio decidendi* of the cases which established the mortgagee's liability. It was first declared that a mortgagee should not be deemed to be owner of a ship: then that the mortgagor should not be deemed to have ceased to be owner: and then it was supposed to be necessary to add "except in so far as may be necessary for making such ship available as a security for the mortgage debt." As long, therefore, as the dealings of the mortgagor with the ship were consistent with the mortgagee's security, and did not tend in any way to prejudice or impair it, the mortgagor had a Parliamentary authority to act in all respects as owner, and therefore to enter into all such contracts relative to the disposition of the ship as were necessary to enable him to obtain the full benefit of his property: but so soon as the mortgagee could show that his security was prejudiced or impaired, the Parliamentary authority ceased. Subject to this qualification the mortgagor might enter into any contract he pleased: the mortgagee would, of course, be able to obtain the benefit of any such contract by giving proper notice to the parties with whom it was entered into.

This his Lordship considered to be a reasonable construction of the statute, and one which would make the law analogous to that with respect to mortgages of real estate, the mortgagors of which were permitted to cut down timber, unless the mortgagees could show that their securities were impaired. But as the point was a novel one, and had not formed the subject of previous decision, he would reserve further consideration of it, and mention the case on a future day.

There was nothing in this case to show that the charter-party was an improper one; and if, on consideration, his Lordship continued to be of the opinion he had intimated with respect to the Law, an injunction would be granted in terms of the prayer.

9 DEC. 1864.

THE LORD CHANCELLOR again mentioned this case, and said that he continued to be of the same opinion as he had already expressed—namely, that so long as the mortgagee was not in possession of the vessel, the mortgagor retained all the powers of owner, and might enter into any contracts respecting it, provided his dealings did not impair the mortgagee's security. He should grant the injunction.

Lord Chancellor. } BARING v. HARRIS.
8, 9 DEC. 1864.

Practice—Appeal—Costs.

Where upon appeal the decrees of the Court below is reversed, the successful appellant will, in a proper case, be allowed the costs of the appeal; and the giving of such costs is a matter in the discretion of the Court in each particular case.

In this case, Vice-Chancellor Kindereley had granted an injunction restraining the whole of the defendants from selling or dealing with a certain ship contrary to the rights of the plaintiffs. One of the defendants appealed, and the Lord Chancellor reversed the decision, and dissolved the injunction as regarded that particular defendant, giving him his costs in the Court below.

Glasse, Q.C., and Kay, for the appellant, asked also for the costs of the appeal. It was now established that where an appellant succeeded he might have his costs of appeal as well as those in the Court below,

Lillie v. Legh, 3 De G. & J. 204;

Railt v. Universal Marine Insurance Company,
10 W. R. 280;

Collins v. Burton, 4 De G. & J. 618;

Leidemann v. Schultz, 14 C. B. 52.

Baily, Q.C., and Cotton, for the plaintiffs, admitted that the old rule, that a successful appellant was only entitled to his costs in the Court below, had been broken in upon; but it was not established that in every case an appellant was entitled to his costs of appeal: the Court would exercise a discretion in each particular case.

THE LORD CHANCELLOR said, that he was glad to find that was the rule, and in the present instance he would give the defendant his costs of appeal.

Lord Chancellor. }
9 DEC. 1864. } *Re FACTAGE PARISIEN*
Master of the Rolls. } (Limited).
8, 5 DEC. 1864.

Winding up—Company—Change of Management.

A limited company, which had lost more than half its capital, by a change of management very much reduced the weekly losses, and held out a prospect of an ultimate profit:—

Held, on appeal, that a winding-up order made in the Court below, ought to be suspended, until the shareholders had had an opportunity of adopting or rejecting the winding-up petition.

Semble, per the MASTER OF THE ROLLS, that a limited company may be wound up, though all its capital has not been called up.

This was a petition by some shareholders to wind up a company originally formed to work a concession by

the French Government of the privilege of carrying on a parcels delivery business in Paris. The registered office was in London, and five of the eight directors were English.

The company commenced operations in 1863, and lost nearly 1000*l.* per week. In June, 1864, the management was changed, and at the same time, as was alleged, the nature of the business: the losses were reduced to between 150*l.* and 100*l.* per week; and as the business was increasing, it appeared probable that, if the company continued to work, there would be a weekly profit.

The nominal capital was 100,000*l.*, divided into 10,000 shares of 10*l.* each. Excluding the amount considered as paid up in the shares which had been allotted to the original concessionnaires as the purchase-money for the concession from the Prefect of the Seine, there had been about 60,000*l.* paid up, and 19,202*l.* was due for calls, and there remained 62,048*l.* to be called up. 16,000*l.* was owing to the bankers of the company, or on bills, and there was only a small balance at the bankers. The other debts amounted only to 1000*l.* The only assets, besides unpaid calls, were the plant at Paris. No dividends had ever been paid.

Selwyn, Q.C., and *Swanston*, for the petition, submitted, that the business had been changed, and that it was just and equitable to wind up the company, according to the interpretation given to those words in *Ex parte Spackman*, 1 M. & G. 170.

This was a stronger case than,

The National Live Stock Insurance Company,
26 Beav. 153.

Baggallay, Q.C., and *Roxburgh*, for the company, contended, that the business had not been changed, only the mode of conducting it. The meaning of "just and equitable" was decided in

Wheat Lovel Mining Company, 1 M. & G. 1, 17.

This was not a losing concern; the losses had been caused by the bad management. The weekly deficits had been very much reduced by the improved management, and would soon disappear. There was necessarily some loss at first starting, in establishing a new business in Paris, and creating a demand.

Selwyn, Q.C., in reply.

THE MASTER OF THE ROLLS said, that, although undoubtedly a limited company stood on a different footing to an unlimited company, yet, if the company was carrying on business at a loss, and manifestly could not make the business a profitable one, it would not be "just and equitable" to allow it to continue carrying on that business. It was impossible for the Court to say, that shareholders must continue embarking their money in what was plainly a losing concern. If, therefore, it appeared to the Court, that the business could not possibly have a favourable result, it would be "just and equitable" to stop it, before the share-

holders had lost all their capital. It was quite a different case from that of a company which was insolvent, or could not pay its debts: for in this case the manager had continued to pay the current debts. If this were a case of a clearly losing concern, the Court would interfere, at the suit of shareholders, and wind up the company. But the observation which was made on behalf of the company, that this was a new business, and that in establishing it there was necessarily a loss, just as there would be in opening a mine, had great weight. Moreover, it was said in the present instance, that the improved system of management would make the business ultimately a profitable one. There had not been time to prove this: and, therefore, the best course would be, to let the petition stand over until some day in January, to see whether the weekly loss had then become a profit, which would materially affect the judgment of the Court. In the meantime, he would request that a meeting of the shareholders should be called, to consider whether they would adopt the winding-up petition, or would go on with the business. The Court would use its power to further the wishes of the shareholders. At present it could not be said that this was an improper petition.

If the company should desire to appeal from this decision, the usual winding-up order must be made.

9 DEC. 1864.

The company having elected to appeal, the case was now heard before

THE LORD CHANCELLOR, who, after the case had been opened, said: He was of opinion that the state of the company's affairs ought to be brought before the shareholders, in order that they might decide whether the enterprise ought to be persevered in or not. If they were of opinion that it ought, that would be the most effectual answer to the allegations of the petition. Without expressing any opinion on the merits, he directed that the order should be entirely suspended till the 11th of January next, in order that such a meeting of the shareholders might be held: such meeting to be called by notices containing an explicit statement of the object for which it was to be held.

Note.—See also, as to taking the opinion of the shareholders on the merits,

East Pant Du United Lead Mining Company v. Merryweather, 4 N. R. 541; 5 N. R. 166.

Lord Chancellor. } PARKINSON v. HANBURY.
13 DEC. 1864.

Practice—Petition of Appeal—Signature of
one Counsel.

A petition of appeal signed by one Counsel only, who had not been engaged in the cause in the Court below, was not received, the Queen's Counsel who had

been engaged in it having refused to sign, and the junior Counsel having left the bar.

The plaintiff in this suit presented, in person, a petition of appeal, signed by one Counsel only, who had not been engaged in the case in the Court below, where the petitioner was represented by a Queen's Counsel, and also a junior Counsel, the latter of whom had left the bar, and the former declined to sign the petition of appeal.

THE LORD CHANCELLOR said, that the Registrar had searched the records of the Court, and had been unable to find any instance in which a petition of appeal signed by one Counsel only, who had not been engaged in the cause in the Court below, had been received. He could not receive this petition, especially as the Queen's Counsel who had been employed in the matter had not thought it to be his duty to sign the petition.

Note.—See, as to the signature of one Counsel sufficing,

Re Midland Counties Benefit Building Society,
4 N. R. 515;
and the cases therein cited.

Master of the Rolls. } **HOLGATE v. JENNINGS.**
6 DEC. 1864.

Will, Construction—Survivorship—Gift by Substitution.

A substituted bequest held to be subject to the same condition of survivorship as the original bequest.

A testator bequeathed the residue of his estate and effects to trustees in trust for his wife for life, and after her decease to distribute and divide the same amongst such of his nephews and nieces as should be living at the time of her decease in equal shares, but if any of them should then be dead leaving issue, then it was his will that such issue should be entitled to their father or mother's share but in equal proportions. One of the nephews died, leaving a daughter who also died before the period of distribution:—

Held, that the daughter took no interest under the bequest.

William Jennings, the testator in this cause, made his will, dated the 8th day of February, 1850, and thereby bequeathed to his trustees the residue of his estate and effects, in trust to pay over the annual proceeds thereof unto his wife Susan Jennings for and during the term of her natural life, and from and immediately after her decease to "distribute and divide" the whole of his residuary estate and effects unto and amongst such of his nephews and nieces, namely, Joseph Crew Jennings, Thomas Robert Jennings, Edward Jennings Martin, Arthur Martin, Elizabeth Holgate, and Ellen Jennings, as should be living at the time of her decease in equal shares and proportions

as tenants in common, and not as joint tenants; "but if any or either of them should then be dead leaving issue," it was his will and meaning that such issue should be entitled to their father or mother's share, but in equal proportions.

The testator died on the 20th day of January, 1854, and his will was proved by Susan Jennings, his widow.

Thomas Robert Jennings died in March, 1853, without having any issue.

Joseph Crew Jennings died in March, 1854, without having any issue. Edward Jennings Martin died in September, 1855, leaving one child only, namely, Augusta Mary Martin, who died under the age of twenty-one years on the 31st day of December, 1863, in the life-time of the widow the tenant for life.

An administration summons had been taken out to administer the estate of the testator, and the widow having died, the present petition was presented by Elizabeth Holgate, praying that the residuary estate of the testator might be divided into three equal parts, in favour of herself, Ellen Jennings, and Arthur Martin.

The question was, whether the representatives of Augusta Mary Martin were not entitled to one-fourth of the testator's residuary estate.

Selwyn, Q.C., Shebbeare, H. P. Shebbeare, and Freeman, in support of the petition, contended that Augusta Mary Martin did not become entitled to a share.

The testator intended by the words "to distribute and divide," to include in the gift only persons who should be capable of receiving the money at the period of distribution.

This was not an independent gift to two classes, but it was a case of substitution, and the testator meant that the issue and their parents should be governed by the same rule.

The word "then" in the will meant the period of distribution, and the question was, whether any of the nephews and nieces were then dead leaving issue. They cited,

Re Corrie's Will, 32 Beav. 426;

Turner v. Sarjent, 17 Beav. 515;

Macgregor v. Macgregor, 2 Coll. 192;

Bennet v. Merryman, 6 Beav. 360;

Atkinson v. Bartrum, 28 Beav. 219.

Baggallay, Q.C., and G. L. Russell, contra, claimed a share for the deceased infant, Augusta Mary Martin. The words, "to distribute and divide" could not affect the number of the shares. The period of division was merely postponed for the convenience of the estate, and in order to let in a prior life-interest.

This was not a case of substitution, but of accretion. Such only of the nephews and nieces as were living at the decease of the tenant for life were originally included; and to them were added by accretion, and not by way of substitution, the issue of those who had died leaving issue.

The conflict of authority in cases of this kind, arose from want of reference to the distinction between cases of substitution and addition,

Crause v. Cooper, 1 John. & H. 207 ;

Wildman's Trust, 1 John. & H. 299.

The preponderance of authority was against importing the qualification into the class of descendants,

2 Jarman on Wills, 172 (3rd ed.) ;

Hayes & Jarman's Concise Forms of Wills, 182 (6th ed.) ;

Lyon v. Coward, 15 Sim. 287 ;

Bennet v. Merryman (*loc. cit.*) was a case of actual substitution.

THE MASTER OF THE ROLLS observed that the cases in point were numerous and irreconcilable ; that it was desirable that the question should be settled by some authoritative decision, and that as the trust funds in the present instance were large, an appeal might be carried to the House of Lords. His Honour thought it unnecessary to say more than that he adopted the observations he had made in the case of *Corrie's Will* (*loc. cit.*). The present was, however, a stronger case than that for adopting the conclusion there arrived at. The expression here was, "if any of them should then be dead, leaving issue." These words were not grammatically correct, if there was no issue then alive. To support the case of *Augusta Mary Martin* the words should have been, "if any of them should then be dead, having left issue." Although the distinction might be fine, the expressions "leaving issue," and "having left issue," were not the same, strictly speaking. Edward Jennings Martin was dead, without issue ; for although it was not so when his daughter was alive, yet when she died he became, and at the time of distribution he was, a person dead, without issue. His Honour was of opinion that this was not a case in which the daughter could take any share, but that the fund should be divided into three shares. The testator did not, in this case, intend to substitute one dead person for another.

Master of the Rolls. } FLEMING v. ARMSTRONG.
7 DEC. 1864.

Practice—Partition—Order for Sale—Married Woman—Separate Estate—Clause against Anticipation.

In a partition suit, a sale was ordered instead of a partition, notwithstanding one of the co-tenants was a married woman entitled absolutely for her separate use, but without power of anticipation.

By a deed-poll, dated the 5th day of May, 1853, Hannah Sandford directed and appointed that a certain farm-house and farm, known as Cossington Lodge Farm, should thenceforth remain and be to the use of Jane Anna Fleming, Harriette Green, and Eliza Armstrong, their heirs, and assigns, as tenants in common,

but subject to the proviso, that the share so appointed for Eliza Armstrong, her heirs, and assigns, should be held by her for her separate use, and independently of her husband, George Armstrong ; but so that she should not have the power, during her marriage with George Armstrong, to alienate, mortgage, or charge the same, or deprive herself of the benefit thereof, or of the rents, issues, and profits thereof, in anticipation.

The present suit was instituted by Jane Anna Fleming and Harriette Green against George Armstrong and Eliza, his wife, for a partition of the farm.

Affidavits were filed, showing that the farm would, if sold as a whole, realise a high price, but that if it should be partitioned the value of the portion, which would be allotted to Eliza Armstrong, would be very seriously diminished ; and the defendants submitted to the Court, that the Court should, in lieu of granting a partition, direct that the farm should be sold in one lot ; that the purchase-money should be divided ; and that the share of the purchase-money, to which the defendant Eliza Armstrong might be entitled, should be paid into Court, and should be invested, and placed to an account to be entitled "The separate account of Eliza Armstrong, the wife of George Armstrong, without power of anticipation."

Dryden, for the plaintiffs, consented to a sale, if the Court should think fit to direct one.

Andrew Thomson, for the defendants, observed that in partition suits, where some of the parties interested were infants, the costs of such parties had been charged upon their respective shares, and a sale had been ordered for the purpose of raising and paying costs.

THE MASTER OF THE ROLLS said, he should make a decree declaring the costs of the defendants to be a charge on Mrs. Armstrong's share, and should direct those costs to be raised thereout. His Honour, accordingly, directed a sale of the farm for that purpose ; the purchase-money to be paid into Court.

Note.—See as to infants,

Thackeray v. Parker, 1 N. R. 567 ;

Davis v. Turvey, 2 N. R. 151.

Master of the Rolls. } HUNT v. MANIERE.
8 DEC. 1864.

Principal and Agent—Injunction—Action at Law—Delay.

A bailee, who knows that goods deposited with him are fraudulent, and that an injunction is about to be applied for to restrain their sale, is entitled to refuse delivery of such goods to his principal.

A wharfinger received notice that certain goods deposited with him were spurious imitations of the goods of another manufacturer, and that an injunction to

restrain him from parting with them was about to be applied for in Chancery, but had not received notice that the injunction was granted:—

Held, that he was justified in refusing to deliver such goods to his principal:

Held, also, that the Court would restrain the principal from prosecuting an action at law to recover damages for the conversion of such goods.

This was a suit to restrain the defendant Maniere from prosecuting an action of trover against the plaintiffs.

The plaintiffs, Messrs. Hunt, were wharfingers, carrying on business in London, who, in January, 1862, warehoused at one of their quays 136 cases of wine, for which thirteen warrants had been given in the name, and deliverable to the order, of H. Bernard. These warrants (endorsed by H. Bernard) were delivered to Maniere by J. Rondeau as a security for a debt which amounted, with interest, to 678*l.*

On the 6th of February, 1863, Messrs. Hunt were informed by the solicitor of Mr. Selby, the English agent of the firm of "Veuve Clicquot Ponsardin," that this wine had corks marked with a counterfeit brand in close imitation of the trade-mark of the firm of "Veuve Clicquot Ponsardin," and was about to be sold as their wine; and that an injunction was to be applied for in Chancery next day, to prevent the sale of this wine; and they were requested to detain it until an injunction could be obtained.

On the 13th of February, 1863, between one and two P. M., an injunction was granted *ex parte* by the Master of the Rolls in a suit of *Ponsardin v. Stear*, (reported on a point of practice, 2 N. R. 477), restraining the Messrs. Hunt from parting with the 136 cases of wine. The Messrs. Hunt received informal notice of this injunction about four P. M., and a formal notice of it between five and six P. M. on the same day. The writ of injunction was served on them on the 17th of February. Maniere, who was admitted to be innocent of the fraud, was not included in this injunction, and, indeed, was not a party to the suit of *Ponsardin v. Stear*.

On the same 13th of February, the agent of Maniere paid at the Custom House 45*l.* 2*s.* 3*d.* for duty on the 136 cases of wine. He then called (about three P. M.) at Messrs. Hunts' quay, and, producing the warrants, asked for the delivery of the wine, offering, at the same time, to pay the amount of their charges. Messrs. Hunts' clerk, after communication with them, refused to state the amount of their charges, as they were stopped by injunction in Chancery from parting with the wine. On Maniere's agent asking what he meant by an injunction, and what notice the Messrs. Hunt had received of it, the clerk replied, "At any rate, one is about to be applied for, and we are indemnified by Mr. Selby against parting with the wine." After this refusal Messrs. Hunts' clerk went to Selby's solicitor and told him of the appli-

cation to deliver the wine, and received from him a letter and copy of the Bill, with which he returned to Messrs. Hunt, and which gave them informal notice of the injunction. A similar application was again made by Maniere's agent, on the 14th of February, and refused.

By an order made in the suit of *Ponsardin v. Stear*, the Messrs. Hunt were to be at liberty to sell part of the wine (after removing the counterfeit brands) for the purpose of paying the wharfage rent and their costs of suit; and, accordingly, the wine having been fresh corked, was advertised for sale on the 16th of June, 1864. On the 13th of June, 1864, on a motion made by Maniere, in the suit of *Ponsardin v. Stear*, Messrs. Hunt were ordered to sell the whole of the wine; and, after paying their own charges, and the costs of the motion (without prejudice to the question as to who was liable to pay them), to pay the balance into Court, with liberty for all parties, including Maniere, to apply. The wine was sold on the 16th of June, 1864, and the balance, amounting to 120*l.* 14*s.* 11*d.*, was paid into Court. Maniere had received 48*l.* 11*s.*, as his taxed costs of that motion. On the 17th of June, 1864, his solicitor claimed 678*l.* 9*s.* 8*d.* from Messrs. Hunt, as compensation for refusing to deliver up the wine, and threatened legal proceedings. An action of trover was then commenced by Maniere against Messrs. Hunt; the writ was issued on the 24th of June, and Messrs. Hunt undertook on the 27th of June to appear. On the 6th of July, the declaration was delivered. On the 15th of July, Messrs. Hunt obtained further time to plead, and also obtained an order to change the venue from Surrey to London; the effect of which was, to prevent the action being tried before the Long Vacation. On the 18th of July, Messrs. Hunt obtained an order for further particulars, which were delivered on the 8th of August. On the 25th of October, they sent their pleas to Maniere's solicitor, and a suggestion of the death of one of their partners, and gave notice of their intention to file a bill to restrain the action. On the 19th of November, replication was put in, and notice of trial given for the 8th of December; and on the 25th of November the bill in the present suit was filed. Messrs. Hunt, besides the usual pleas of "not guilty" and "not possessed," had pleaded "accord and satisfaction," relying on the order of the 13th of June. Messrs. Hunt stated, that they had been advised, on the 11th of July, to file a bill, and that they would have done so, but for the order of the 18th of July, which, until delivery of the particulars, operated as a stay of proceedings, and as the particulars were not delivered until the 8th of August, the time to plead did not expire until after the Long Vacation, which ended on the 24th of October. They also alleged, that they had no valid defence at law.

Selwyn, Q.C., and Joseph Howard, for the plaintiffs, now moved for an interlocutory injunction, on the

ground that the injunction in *Ponsardin v. Stear*, was granted before Maniere had applied for the wine, and that Messrs. Hunt would have acted wrongly in delivering the wine when they knew an injunction was shortly to be applied for. By obtaining the order of the 13th of June, Maniere had submitted to be bound by the proceedings in that suit. They excused the delay since the 25th of October, by the unwillingness of Messrs. Hunt to file a bill, while there was any hope of Maniere discontinuing his action at law.

Hobhouse, Q.C., Lovell, and Morgan Howard (of the Common Law bar), for the defendant Maniere, contended that this was a case of two innocent parties, where the Court would not interfere with the one who possessed the legal right. Maniere had the legal right, as principal, to have strict obedience from his agent, the wharfingers, until such agent was actually served with the injunction, which placed the goods in *custodia legis*. Until the injunction was served, it was a question of Law, not of Equity, whether the previous notice of the intended application was a sufficient justification for the agent's disobedience and in such a case an injunction would not be granted.

Farebrother v. Welchman, 3 Drew. 122.

An agent ought to assist his principal, and not act for third parties, in opposition to him. A banker, with notice of a claim on a customer's balance, could not for that reason refuse to cash that customer's cheque until an injunction or a foreign attachment had been actually served, although he had notice that the injunction or attachment were going to be applied for. If Messrs. Hunt had delivered the wine, they would not have been liable for violating an injunction of the Court of Chancery, nor would they have been liable to any person at Law. Part of the damage sustained by Maniere had arisen from the costs of the suit, and wharfage rent having been charged on the proceeds of the wine in priority to his charge. The plaintiffs in *Ponsardin v. Stear*, should have made Maniere a party to the bill, if they wished to restrain him from dealing with the wine. He had always been at liberty to sell it. The order of the 13th of June did not alter the previous right of Maniere against Messrs. Hunt as wharfingers, and as they had allowed Maniere to proceed so far at Law, they were precluded by delay from stopping him now.

THE MASTER OF THE ROLLS, without calling for a reply, said, that the wharfingers had acted rightly. They had possession of this wine, which they knew to be a fraudulent imitation of the manufacture or growth of other persons, by whom they were informed that a bill would be filed, and that an injunction was to be obtained on a particular day. Then the holder of the warrants, before notice of the injunction had been served on the wharfingers, asked for the delivery of the wine, and was refused. The wharfingers sent

to inquire, and found that an injunction had been actually granted at the time of such refusal. The wharfingers would have acted culpably if they had allowed the wine at that time to pass out of their possession. His Honour assumed that at Law they were bound to deliver the wine to the holder of the warrants, and that a jury would find that the owner had sustained damages by the refusal of the wharfingers. But in Equity the case was different. The Court would require a person, under such circumstances, not to deliver up the property, and would restrain an action against such person for the conversion of it. The Court acted thus in many analogous cases; for instance,—supposing a trust fund was deposited at a bank in the name of a trustee, and the bankers received notice that the trustee was intending to take out the fund, and apply it to his own purposes, and that a bill was about to be filed, and an injunction obtained to restrain such a dealing with the fund: if the bankers, after that notice, refused to pay the money to the trustee, the Court would not allow the trustee to bring an action against the bankers for damages, as the only damage that he had sustained was, that he had been prevented from obtaining a profit by committing a breach of trust. In the present case, the only benefit that the defendant Maniere would have reaped by obtaining the wine on the 13th of February was, that by selling the wine as Clicquot's champagne, and not as spurious champagne—that is to say, by committing a gross fraud—he would have obtained a higher price for it. In fact, an action had been brought against wharfingers to recover damages for their having prevented the plaintiff in the action from obtaining a benefit by fraud, and it was argued that that was the Law; but if so, it was not Equity, and the further prosecution of such an action would be restrained. The order of the 13th of June did not affect the rights of Maniere. The delay in filing the bill might affect the question of costs, but could not alter the equity.

He should, without prejudice to any question as to the costs in *Ponsardin v. Stear*, restrain the defendant Maniere from prosecuting his action at Law against Messrs. Hunt until the hearing of the cause, or the further order of the Court.

Kindersley, V.-C. } LEYCESTER v. LEYCESTER.
8 DEC. 1864.

Practice—Revivor—Death of Co-Plaintiff having no Interest.

Where in an administration suit a co-plaintiff died, who, it was alleged, had no interest in the estate, leave was given to revive the suit, without making her representatives parties thereto.

This was a suit for the administration of the estate of a Mr. Leycester. Mrs. Leycester, widow of the

deceased and one of the co-plaintiffs, had since died, and no representation had been taken out to her. Mr. Leycester's estate was not sufficient to pay his specialty debts, and Mrs. Leycester, consequently, had no interest therein; but the Chief Clerk had not yet made his certificate to that effect.

Rawlinson now moved to revive the suit against the defendant, without making the representatives of Mrs. Leycester parties thereto. He cited,

Ure v. Lord, 13 W. R. 41.

KINDERSLEY, V.-C., said, that the best course to adopt would be to insert an allegation in the statement of revivor, that the deceased lady had no interest in the suit; and, when the cause came on for hearing, his Honour would either proceed in the absence of her representatives, or appoint some one to represent her estate.

Wood, V.-C. } TATHAM v. DRUMMOND (2).
8, 9 Dec. 1864.

*Will, Construction—Power of Appointment—
Interest on Gift—Arrears of Income.*

By the marriage settlement of a woman personally was settled upon trusts for the payment of the income to her during her life without power of anticipation, with a power of appointment over the capital by will. By her will made in execution of the power, "and of every or any other power or authority in that behalf her enabling," she directed the trustees of the settlement to pay certain sums "out of the trust bank annuities, funds, and property," thereby settled:—

Held, that the gifts were in the nature of legacies, and did not bear interest till the expiration of one year after her death, and that the arrears of income, falling due during her lifetime, and which had not been paid over to her passed by her will.

By the settlement made on the marriage of the Viscountess d'Alté, she had, in the event of her dying in the Viscount's lifetime, and of there being no child of the marriage, who should attain a vested interest in the trust funds (both which events happened), a power of disposing by will of certain trust funds, in which she took a life interest without power of anticipation, but subject to an annuity of 800*l.* to the Viscount if he survived her.

By her will dated the 4th of September, 1848, the Viscountess, in exercise and execution of the power, directed and appointed, that (in the events which happened) the trustees or trustee for the time being of the settlement should by and out of the trust bank annuities, funds, and property thereby settled or expressed or intended so to be, but subject and without prejudice to the annuity of 800*l.*, transfer into or purchase in the name of the plaintiff such a sum of Consols as would produce in dividends 100*l.*

a year; and after directing several other purchases of Consols, she directed such transfers or purchases to be paid out of the residue of the trust bank annuities, funds, and property comprised in the settlement, and, subject thereto, she appointed and bequeathed the residue to her mother. The will also contained an appointment of executors.

The questions to be decided were—

First. Did the gift to the plaintiff bear interest from the death of the testatrix?

Secondly. Did arrears of the rents of the leaseholds, subject to the trusts of the settlement, which arrears became due before the death of the Viscountess, but which had not been paid to her, and the part, if any, of the rents which became apportionable at her death, pass by her will?

W. M. James, Q.C., and *Wickens*, for the plaintiff, and *Giffard, Q.C.*, and *Goren*, for the trustees, argued, on the first question, that interest was payable from the death of the testatrix. The testatrix was dealing with a *specific* fund, to be parcelled out among various persons—each gift was, therefore, *specific*,

Page v. Leapingwell, 18 Beav. 466;

Re Harris's Trust, John. 199.

It mattered not that the exact amount of the fund was not determined,

Esam v. Appleford, 5 Myl. & Cr. 61;

Ex parte Chadwin, 3 Swans. 380.

They denied that the gifts were strictly speaking legacies. The so-called will was a mere instrument of apportionment, and not properly speaking a will. Probate of such a document was merely required to show that the power had been properly exercised by will,

Drake v. Attorney-General, 10 Cl. & Fin. 279.

The appointed fund did not form part of the testatrix's estate, the executor, *quâ* executor, had no title to it,

Platt v. Routh, 6 M. & W. 791.

Before 23 & 24 Vict. c. 15, s. 4, probate duty was not payable in respect of such an apportioned fund,

Drake v. Attorney-General, *loc. cit.*;

Platt v. Routh, *loc. cit.*

Even if the gifts were general legacies, they would carry interest from the death of the testatrix: for the appointor being a married woman, could have no debts, except such as were payable out of her separate property, and the ordinary rule was not applicable,

Vaughan v. Vanderstegen, 2 Drew. 165;

Hobday v. Peters, 28 Beav. 354;

Blatchford v. Woolley, 2 Drew. & Sm. 204.

Freeling, for other trustees, argued, on the second question, that the arrears and apportionable parts of the rents did not pass by the will. He drew a distinction between power and property; and contended that the so-called residuary gift in the will was only an appointment of the residue of the fund subject to the power,

Brown's Trusts, 1 K. & J. 522;

Re Harris's Trusts, John. 199 ;

Tugman v. Hopkins, 4 Man. & Gr. 389.

The executors did not take the arrears and apportionable parts *jure representationis*.

Roll, Q.C., and *Cotton*, for the residuary legatee, argued, on the first question, that the legacies were not specific, and that the due administration of the estate required the application of the ordinary rule which allowed the executors a year from the death of the testator before distributing the estate ; and, on the second question, they argued, that the intention was to pass the arrears, and a will of a married woman under a power must be construed like any other will,

Oke v. Heath, 1 Ves. 139.

Giffard, Q.C., in reply, contended that the will referred to the power only, and affected to exercise that power, i.e., to pass *corpus* only. How could the arrears, which were part of the testatrix's separate estate, pass by appointment of *corpus* ? The appointment was made subject to the annuity, while her separate estate was not subject to it.

Wood, V.-C., said, on the first question, that although married women had for many years given legacies by wills made under powers, no authority had been brought to show that such gifts bore interest from the death of the testatrix. When a married woman exercised a power of appointment by will over a fund, the ordinary incidents of a will applied, and the legacies were not rendered specific by the mere fact of their having to be paid out of the fund over which the married woman had a power of appointment.

On the second question, he held that the intention of the testatrix was to dispose of everything that was in the hands of the trustees of the settlement, and that for that reason the arrears, and the apportioned part, if any, of the rents of the leaseholds, passed.

Minute.—Declare that all arrears of income passed by the testatrix's appointment. Declare that interest is payable on the legacy, to the plaintiff, from a year after the death of the testatrix.

Wood, V.-C. } *CHINNOCK v. MARCHIONESS*
23 Nov. 13 Dec. 1864. } OF ELY.

Specific Performance—Damages.

The Act 21 & 22 Vict. c. 7, does not give to a plaintiff any claim for damages arising merely through the non-performance of a contract, but the usual account of interest and rent will be directed.

This was a bill for specific performance of a contract for sale of a house at Prince's Gate, possession of which, by the contract, was to have been given on the 1st of April, 1864. The Vice-Chancellor having decided that the contract was a valid one, and decreed specific performance thereof, the question arose, as to whether the plaintiff was entitled to damages, on account of the loss occasioned to him by the non-completion of the contract at the time specified, inasmuch as he had been thereby prevented from letting the house during the past London season. The bill prayed for damages.

The present report is confined to the question of damages.

Roll, Q.C., *Sir Hugh Cairns, Q.C.*, and *Fry*, for the plaintiff, cited,

Brady v. Oastler, 33 L. J. (N.S.) Ex. 301, 303.

Giffard, Q.C., and *W. Barber*, for the defendant.

13 Dec. 1864.

Wood, V.-C., said, that the only question reserved was that of the damage sustained by the plaintiff. The only instance in which the Court gave damages was where some special damage had been sustained by the plaintiff. In no case did he find that damages had been given simply from the fact of the non-performance of the contract within the time specified. The consideration that the plaintiff might, if the contract had been performed within the time specified, have made profit by letting the house, could not affect the question. There would, therefore, be the usual account of purchase-money and interest on the one side, and of rent on the other. The case of *Brady v. Oastler* (*loc. cit.*) did not seem to him opposed to the view he had taken.

COMMON LAW.

C. P. } NAYLOR and Others v.
24 JUNE, 1864. } MORTIMORE.

*Bankruptcy—Private Arrangement Clauses—
12 & 13 Vict. c. 106—Certificate a bar to a
debt, and subsequent judgment on it—Ad-
journment—Letter of Attorney not under
Seal—Mode of carrying out Arrangement.*

The plaintiffs were creditors of the defendant on three bills of exchange, and, on his petitioning the Court of Bankruptcy for protection under the private arrangement clauses of 12 & 13 Vict. c. 106, proved their debt. The defendant was afterwards adjudicated a bankrupt on the plaintiffs' petition, and the proceedings were adjourned into open Court: but the Lords Justices, on appeal, reversed the order and remitted the case to the Commissioner, who thereupon ordered a fresh adjournment of the first sitting under the petition, at which a proposal of the defendant was accepted by the statutory majority of his creditors, and a certificate of conformity granted under section 221. Subsequently to proving their debt as above mentioned, the plaintiffs sued on the bills, and, after the granting of the above-mentioned certificate, recovered judgments, on which they brought this action:—

Held, that the certificate was as much a bar to an action on the judgments as it would be to an action on the debts for which the judgments were recovered:

Held, also, that the further adjournment of the first sitting, after the case had been remitted to the Commissioner, was rightly made.

The above-mentioned proposal was assented to by agents of unincorporated joint-stock companies acting on letters of attorney under seal, which were executed by the managers of the companies, but the latter were not authorised by their companies under seal to do so. The companies took the composition, and ratified the acts of their managers:—

Held, that the letters of attorney need not necessarily be by deed, and were sufficient.

The proposal, as accepted, stipulated that an instalment of the composition should be paid in cash by a day certain, and the rest by notes secured by a bond. Some of the creditors, however, were paid in full in cash: some were paid the first instalment after the proper day; and the bond was not simply to secure the notes, but was conditioned to be void if proceedings in bankruptcy were taken. The composition was tendered to the plaintiffs in exact accordance with the proposal; and

all the other creditors received it in full. No proceedings in bankruptcy could have been taken so as to avoid the bond:—

Held, that the arrangement had been carried out in conformity with the proposal, and that the informality in the bond did not affect the certificate.

In an action on two judgments recovered against the defendant for 1,158*l.* 15*s.* 9*d.*, and 2,257*l.* 9*s.* 6*d.*, the defence raised was a composition between the defendant and his creditors, under the private arrangement clauses of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, ss. 211–223).

At the trial, before Willes, J., at the Guildhall, after Michaelmas Term, 1862, it was agreed that a special case should be stated for the opinion of the Court.

The following is a summary of the special case:—

The plaintiffs were bankers at Liverpool, and the defendant was a tanner at Andover. This action, commenced on the 25th of April, 1861, was on two judgments recovered against the defendant for 1,158*l.* 15*s.* 9*d.*, and 2,257*l.* 9*s.* 6*d.* respectively. The first judgment, dated the 25th of March, 1861, was in an action by the plaintiffs as indorsees of L. M. & Co., against the defendant as acceptor of a bill for 1,132*l.* 14*s.* 7*d.*, drawn by S. L. & Co. on the 23rd of June, 1860. The second judgment, dated the 4th of April, 1861, was in an action by the plaintiffs, as indorsees of L. M. & Co., against the defendant as acceptor of two bills for 955*l.* 7*s.* 7*d.*, and 1,221*l.* 4*s.* 1*d.*, drawn by L. M. & Co. on the 14th of April and the 10th of March, 1860. In both actions the defendant suffered judgment by default, and in the first he did not appear.

On the 2nd of July, 1860, previous to either of the above actions, and while the plaintiffs were holders of the bills, the defendant stopped payment; and on the 31st of August, 1860, obtained, under 12 & 13 Vict. c. 106, s. 211, an order for protection from process till the 26th of September, 1860, which day was fixed for a private sitting for proof of debts, and to obtain the assent of three-fifths in number and value of the creditors, who should have proved debts for 10*l.* and upwards, to a proposal for future payment or compromise; at the same time an official assignee was appointed. On the 13th of September, the defendant filed his accounts in bankruptcy (liabilities, 96,842*l.* 5*s.* 10*d.*; assets, 55,870*l.* 0*s.* 4*d.*), and a proposal to pay a composition of 11*s.* in the pound. At

the first sitting, on the said 26th of September, the plaintiffs proved on the three bills for 3,314*l.* 19*s.*, including costs, and dissented from the defendant's said proposal, on the ground that he had not set out in his petition the true cause of his failure. To complete the defendant's examination, the sitting was adjourned till the following 4th of October, and then again adjourned to the 25th, when the Court adjudged the defendant a bankrupt on the plaintiffs' petition, and adjourned the proceedings into open Court; but did not otherwise adjourn the meeting. On the previous 18th of October, the defendant had filed a modified proposal to pay 10*s.* in the pound by five instalments; but no resolution was taken on it at the meeting of the 25th. The order of the 25th of October was reversed by the Lords Justices on the 31st of January, 1861, on appeal by the defendant, and they remitted the case to the Commissioner for further consideration (see 30 L. J. Bkcy. 17). On the 19th of February, 1861, the Commissioner ordered the first sitting under the petition to be adjourned to the 13th of March, 1861, and that any further modification of the proposal should be in writing, and filed ten days before that day. On the 28th of February, 1861, the defendant filed a proposal to pay 10*s.* in the pound, by 4*s.* cash and three notes for 2*s.* each payable respectively on the 1st of June and the 1st of December, 1861, and the 1st of March, 1862, and to be secured by bond. The plaintiffs had notice of the meeting of the said 13th of March, but did not attend. They had then commenced the two actions above mentioned. At the said meeting on the 13th of March, all the other creditors but the plaintiffs attended, and proved for 103,610*l.* 10*s.* 5*d.* They were more than three-fifths in number and value of the creditors who had then proved for 10*l.* and upwards; and they assented to the said modified proposal of the 28th of February. The next sitting to confirm the said proposal was fixed for the 3rd of April; and on the 20th of March the defendant filed and delivered to the messenger of the Court a list of creditors upon whom to serve notice of this sitting. The notice to the plaintiffs was forwarded to Liverpool, but, owing to their absence from their bank, was not served on them till the 27th of March.

At the sitting of the 3rd of April, the plaintiffs appeared by counsel, and opposed the modified proposal of the 28th of February, and objected to the proceedings on the petition, but not on the ground of want of notice of the meeting. The meeting was not attended by any creditor in person, except a Mr. Kellow; but Dawes, the defendant's solicitor, appeared for a great many creditors under powers of attorney, and signed the said proposal of the 28th of February on behalf of more than three-fifths in number and value of the creditors. The document which purported to be the proceedings at the said sittings was then signed by the said Kellow, a creditor, Elsey, the said Dawes, Hutchins, Hayter, and Hughes (the four

latter as attorneys under powers of attorney), on behalf of the creditors; but except as aforesaid the said proposal was not put in writing and signed by any of the creditors, or any one on their behalf, at the said meeting. At the same meeting the Commissioner, on the defendant's application, and without objection by the plaintiff's counsel, decided that, unless he intimated to the contrary, the said proposal should be confirmed as of the 3rd of April, but that the bond, &c., need not be delivered till the 10th, and that no one need attend on that day unless he intimated that he entertained a doubt. No such intimation was made, and on the 10th of April the order dated the 3rd of April, 1861, was made. The said document, purporting to be the proceedings on the 3rd of April, was signed by Dawes expressly as attorney for the Bank of London, and also for the London Discount Company (Limited), and also for the National Discount Company (Limited); by Hutchins for the Bucks and Oxon Union Bank; by Hayter for the London Joint Stock Bank; and by Elsey as agent for the Bank of England.

The Bank of London is a corporate bank, established by letters patent under 7 & 8 Vict. c. 113, with an acting manager named Marshall, who had proved on behalf of the bank for 3,176*l.* 0*s.* 6*d.*, and he executed and gave Dawes the power of attorney to act for the bank, but was not empowered so to do under the common seal of the bank, or otherwise, unless as acting manager.

The secretaries of the said London Discount and National Discount Companies respectively were Woodhouse and Price, and they had proved the debts of their said companies under the petition at 3,184*l.* 8*s.* 11*d.* and 5,096*l.* 8*s.* 3*d.* respectively; and they respectively executed and gave Dawes the powers of attorney under which he acted on the 3rd of April in the form usually adopted in the Court of Bankruptcy, and usually executed by the secretaries of the said discount companies; but they were neither of them empowered so to do under the seal of their said companies.

The London Joint-Stock Bank is a copartnership of more than six persons formed before 1837, and carrying on business in London under 7 Geo. 4, c. 46, and entitled to sue and be sued by its public officer, Taylor, who proved under the petition a debt to the bank of 17,094*l.* 19*s.* 9*d.*, and the said Taylor executed and gave the said Hayter the power of attorney to act for the bank in the matter of the said petition, under a special resolution of the directors.

The Bucks and Oxon Union Bank was established and incorporated by letters patent of the 9th of March, 1853, and its secretary and manager, Carter, proved its debt against the defendant at 877*l.* 14*s.* 6*d.* He executed and gave Hutchins the power of attorney under which he acted on the 3rd of April, in the form and manner usual with the bank, but without being empowered under the common seal of the bank so to do.

Neither the Bank of London, nor the London Dis-

count Company, nor the National Discount Company, nor the London Joint-Stock Bank, nor the Bucks and Oxon Union Bank, have disputed the validity of the said several powers of attorney, or the right of the said several persons who gave the same so to do; and they have severally received the composition in full satisfaction of their several debts.

Elsey voted and signed the said resolution for the Bank of England, in respect of their proof of 9076*l.* 1*s.* 4*d.*, under a power of attorney, under the seal of the said Bank. The Bank have not objected to the validity of Elsey's acts under the petition, and have received the composition in full in satisfaction of their debt.

The total of debts of 10*l.* and upwards, proved at or before the said meeting of the 3rd of April, was 103,637*l.* 10*s.* 5*d.* If the above powers of attorney are valid, the assents to the said modified proposal represented more (*viz.*, 84,583*l.*), but if they were invalid, and the debts proved under them deducted, less, than three-fifths in number and value (*viz.*, 62,182*l.* 10*s.* 3*d.*) of the creditors who had so proved. If the powers given on behalf of the London Joint-Stock Bank and the Bank of England were invalid, then, deducting the debts proved thereunder (together 26,171*l.* 1*s.* 1*d.*), the assents and signatures would be less than three-fifths in value of the debts of 10*l.* and upwards proved as above mentioned; but if both the said powers were sufficient, or only that of the London Joint-Stock Bank, then more than the said three-fifths agreed to and signed the said resolution.

The defendant, in compliance with his said proposal of the 28th of February, executed a bond on the said 3rd of April, as did his sureties, whose names were mentioned in the proposal before it was agreed to; and on the 10th of April, the defendant deposited with the official assignee, as trustee for the creditors, the said bond and promissory notes, in pursuance of the modified proposal. The form of the bond was not submitted to the creditors, or the plaintiffs, or the official assignee, but it lay on the table at the sitting of the said 3rd of April, open for inspection. It was not settled by the Commissioner, as no objection was made to it by any one. The plaintiffs now objected to it as not being in compliance with the proposal.

On the 10th of April, 1861, the defendant tendered the plaintiffs the composition of 10*s.* in the pound, *viz.*, 4*s.* in the pound cash, and three notes for the 2*s.* in the pound each, on the amount of their debt; but the tender was refused. The notes were again deposited with the official assignee, and on the days they respectively fell due were again tendered to the plaintiffs, with their respective amounts in cash; this tender also was refused. On the 1st of March, 1862, the whole composition of 10*s.* was tendered to the plaintiffs in cash; and this, too, was refused. On the 8th of March, 1862, the Court of Bankruptcy granted certificates to the defendant, and the official assignee, under sections 221 and 222 of the Bankrupt Law Con-

solidation Act, 1849. Before the defendant applied for and obtained the certificate, all the creditors, but the plaintiffs, had received the composition of 10*s.* in the pound in full, in discharge of their debts, without objection, many receiving the whole in cash at one payment. Of these latter, some lived in the country, and a few of them were paid on the 12th of April, 1861, and some few others after the 17th of April.

The question for the opinion of the Court is, whether, under the circumstances stated, the defendant has any defence to this action. If the Court is of opinion that he has, then the verdict is to be entered on the several pleas as the Court may direct. If the Court is of the contrary opinion, then the verdict is to be entered for the plaintiffs for the amounts of the said judgments, with interest at 4*l.* per cent. per annum.

By the proposal mentioned in the case, and which was adopted, the cash instalment of 4*s.* was to be paid within seven days after the Court confirmed any resolution of the creditors to accept a modified proposal; and the bond to the official assignee, as trustee for the creditors, was to guarantee the last three instalments secured by the defendant's notes, and to be settled by the Commissioner if the parties differed. The bond was conditioned to be void if the defendant duly made, and had ready for delivery, the notes as mentioned in the modified proposal of the 28th of February, 1861, in the manner and within the period therein specified, and if the three last of the said instalments were duly paid at the times and in the manner provided by the modified proposal; "or if, before any default should be made in payment of the said instalments, or any of them, or any part thereof, the said T. H. Mortimore should be adjudicated a bankrupt in respect of any debt proved or proveable under the said petition so filed by him in the said Court of Bankruptcy as aforesaid."

J. Browne (*Yonge* with him), for the plaintiffs.

The certificate obtained by the defendant under 12 & 13 Vict. c. 106, s. 221, is no defence to this action, for it is no absolute discharge unless he has strictly carried into effect the requirements of the resolution of the creditors; there are a variety of objections to it.

Allcard v. Wesson, 7 Exch. 753; affirmed in Error, 8 Exch. 260.

1st. It is no discharge of the judgment, though it may be of the debt, for the debt did not exist as a judgment debt at the time of the certificate.

Van Sandau v. Corbie, 3 B. & Ald. 13, is distinguishable as the case of a certificate granted in a regular bankruptcy.

[This point was abandoned.]

2nd. There was no lawful adjournment after the decision of the Lords Justices; so that the proposal was not assented to by the creditors at the first

sitting, or some adjournment thereof, as required by section 215.

3rd. The certificate is void, because there were not sufficient assents under section 216; for though the persons who represented the joint-stock companies acted under powers of attorney under seal, the managers and secretaries of the companies who executed those powers, had no authority to give them; and if they had, they were not authorised by the seal of their companies to do so; so that it must be taken that the agents of the companies acted at the second sitting on letters of attorney without seal. But the letter of attorney mentioned in section 217 must be under seal,

Rez v. Fauntleroy, 2 Bing. 413;
Co. Litt. 52 a.

4th. The provisions of the agreement under section 216 have not been carried into effect: for

(a) The bond, instead of being simply for payment of the instalments, is conditioned to be void on proceedings in bankruptcy;

(b) Some of the creditors were paid in full in cash, instead of partly by cash and partly in notes;

(c) Some creditors were paid their instalments after the proper time.

Evans v. Powis, 1 Exch. 601;

Cumber v. Wane, 1 Sm. L. C. 288, 295 (5th ed.).

Manisty, Q.C. (*Holland* with him), for the defendant, was not called upon.

WILLIAMS, J.—We are all of opinion that our judgment should be for the defendant. The chief objection urged against the defence he sets up rests on the decision in *Allcard v. Wesson* (*loc. cit.*), which establishes that a certificate under section 221 of the 12 & 13 Vict. c. 106, is not conclusive as to the fact of the resolution and agreement having been carried into effect, and the creditors having been satisfied; and it is said the certificate can only be granted on the resolution and agreement being carried into effect, and the creditors being satisfied.

As to the objections, that the agreement has not been carried into effect, because some of the creditors have been paid in cash instead of in the way prescribed by the proposal; and that some creditors accepted notes at a later date than the proposal intended; we think that, as the creditors have in substance been satisfied, and as the plaintiffs might have had a performance of the agreement, those objections are not open to them.

Then it was objected, that the bond was not given as contemplated by the proposal, because, instead of simply guaranteeing the payment of the latter instalments, it was conditioned to be void, if proceedings in bankruptcy were taken before default in payment. But we think the bond was only intended to secure the condition as to the payment of the instalments, and that they were properly paid before the certificate was granted. The certificate cannot be invalidated by a

mere informality of that kind in the bond; the bond was to secure the performance of a thing that was accordingly done, and done before the certificate was granted. Then section 217 provides, that any person, duly authorised by letter of attorney from a creditor who has proved for 10*l.* or upwards, may vote on the question of assent or dissent to the proposal of the petitioning trader; and a sufficient number of creditors did assent, if the votes of those are to be counted who had authority from creditors, but not by warrant of attorney under seal. For many purposes a letter of attorney must be by deed (Co. Litt. 52 a), but it need not be so in all cases. The powers of attorney here were given by the managers of unincorporated joint-stock companies, and it is objected that they were not authorised under seal to do so; but, bearing in mind the object of the Legislature, and that it is practically impossible for unincorporated joint-stock companies to constitute an attorney to vote for them by deed, we are not compelled to say that the letter of attorney here must necessarily be a warrant of attorney under seal. *Allcard v. Wesson* is a binding authority that a creditor may object, notwithstanding the certificate, if no proper notice were given him; but I do not admit that it is an authority that as to other matters the certificate is not conclusive as to the regularity of the proceedings. *Ex parte Ackroyd* (1 M. D. & D. 555), is directly in point on the informality of the letters of attorney. There is nothing in the other points. As to the adjournment not being a proper one, the Lords Justices remitted the case to the *status quo* when the order was made which they reversed. As to the judgment being obtained after the certificate, the authorities are conclusive, and the point was rightly abandoned. I think, therefore, that the certificate is valid, and a good bar to the action.

WILLES, J.—It is objected that some of the creditors received cash in full, instead of being paid in part by promissory notes. They received more than they bargained for. The previous payment would have operated as a payment of the notes when due, supposing they had been given, so that it would have been useless to give them, and no fraud or preference of creditors is suggested.

The next objection is, that some of the creditors received the first instalment after the seven days fixed for the payment of it; and if they made the objection it might be a good answer to the defence (*Hazard v. Mare*, 30 L. J. Ex. 97), as the same considerations are to be applied to a composition under the statute as to a composition independent of it. Here the payment to some few creditors was postponed accidentally, and not by any arrangement that could interfere with the rights of the plaintiffs, who had everything that was due to them tendered at the right time. Those who accepted the instalment after the time waived their objection, as they had a right to do.

The debtor engaged that the bond should be a suffi-

cient security for the last three instalments, and there was a condition in the bond that if, before default in payment of the instalments, the defendant was made bankrupt in respect of debts proved or proveable under the petition, it should be void. That might have been a serious objection but for this, that no one could proceed to adjudication in bankruptcy in this case; the creditors bound by the deed could not, any more than creditors who had assented to a composition independent of the act, if the debtor had fulfilled his agreement, or if the time for fulfilment was not come. It would be a violation of the agreement between them to proceed before any default of the debtor, who was fulfilling an engagement substituted by the agreement for the original debt. Then was there any creditor who had no notice of the proceedings under the arrangement, or one to whom an excepted debt was due, who might have made the defendant a bankrupt? As there is no mention of such a creditor in the case, we must take it there was not.

All the other objections, I think, fail; and the Court seldom has a case before it in which the debtor has so thoroughly complied with all his engagements as in this.

BYLES and KEATING, JJ., concurred.

Judgment for the defendant.

G. P. }
23, 24, 25 JUNE, 1864. } RUSSELL v. NIEMANN.

Bill of Lading—Charter-party—"King's Enemies."

Defendant signed a bill of lading at Odessa, by which he agreed to carry a cargo thence to Great Britain for K, at Odessa, who indorsed the bill of lading to the plaintiffs, who were English. The ship sailed under Mecklenburg colours, and the owners and the defendant were subjects of the Duke of Mecklenburg-Schwerin. Amongst the perils excepted by the bill of lading was, "the king's enemies;" amongst those excepted in the charter-party, "enemies, and restraint of princes;" and the bill of lading contained a reference to the charter-party:—

Held, that "king's enemies," in the bill of lading at any rate included enemies of the Duke of Mecklenburg-Schwerin.

Held, also, that the perils excepted in the charter-party were not incorporated into the bill of lading, and that the defendant could not avail himself of them.

The declaration stated that, after the 14th of August, 1855, certain persons in parts beyond the seas, to wit Messrs. G. Kellner & Co., at Odessa, delivered certain goods to the defendant to be carried by him in his ship from Odessa to Cork or Falmouth for orders, and thence to one of certain ports as ordered under a bill of lading signed by the defendant, whereby the defendant agreed to deliver the goods at the port of

destination, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted, unto order and assigns paying freight for the said goods, and all other conditions as per charter-party," dated, &c., at Odessa, with average accustomed: it then averred that the plaintiff became owner of the goods by indorsement of the bill of lading to him by Kellner & Co.; that the ship with the goods on board arrived at Falmouth, and that the defendant was then duly ordered by the plaintiff to proceed to Limerick; and that conditions precedent were performed: and then laid as breach, that the defendant, though not prevented by any of the excepted perils, made default in obeying the said order, and proceeding with the cargo to Limerick in pursuance of the said bill of lading and charter-party; and claimed damages for loss of profits.

The 5th plea set out the charter-party, which described the master as of the good ship . . . "under Mecklenburg colours, now in the port of Odessa," and the charterers as "Messrs. G. Kellner & Co., merchants and charterers;" the voyage to be to a safe port in Great Britain or Ireland, except the north-west coast of the latter; or on the Continent between Havre and Hamburg, Belgium excepted; calling at Cork or Falmouth, at master's option, for orders; the perils excepted being, "the act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers and navigation, of what nature or kind soever, during the said voyage."

It then set out the bill of lading, and averred that the owners of the ship and the defendant were subjects of the Duke of Mecklenburg-Schwerin, and that the ship was a Mecklenburg ship, sailing under Mecklenburg colours, and that the default complained of was caused by the act of the enemies of the Duke of Mecklenburg-Schwerin, being the king's enemies within the true intent and meaning of the bill of lading.

The 6th plea repeated the 5th plea, as to the bill of lading and charter-party, by reference thereto, and averred that the default complained of was caused by the act of enemies during the voyage, within the true intent and meaning of the charter-party.

The 7th plea similarly referred to the 5th, and averred that the default complained of was caused by the restraint of princes, within the true intent and meaning of the charter-party.

Demurrer to the declaration.

Further replication to the 5th plea, that the said bill of lading and charter-party were respectively made and signed at Odessa, in the Empire of Russia, and that the said Messrs. Kellner & Co. were not, nor was any of them, a subject or subjects of the Duke of Mecklenburg-Schwerin.

Demurrer to pleas 6 and 7.

Demurrer to the further replication to the 5th plea.

Sir G. Honyman (Lush, Q.C., with him), for the plaintiffs.

The goods, a cargo of wheat, were shipped at Odessa in Russia by foreigners, and the plaintiffs, the indorsees of the bill of lading, were English. The ship-owners, and the defendant, who signed the bill of lading, were subjects of the Duke of Mecklenburg-Schwerin. The port of discharge was British, and the ship was captured while on the voyage by a Danish cruiser, Denmark being at war with Mecklenburg, but at peace with this country and Russia. Though the ship was under Mecklenburg colours, the enemies of the Duke were not "king's enemies" within the meaning of the bill of lading. The defendant cannot avail himself of the exceptions in the charter-party.

Mellish, Q.C. (Hannen with him), for the defendant.

"The king's enemies" will include any hostile government, as a king is any person with sovereign authority; and they must be the enemies of the king whose subject the shipowner is. If the king of the shipper were meant, there would be great difficulty in the case of a general ship. The exceptions in the charter-party are incorporated in the bill of lading.

Sir G. Honyman in reply.

WILLES, J.—The defendant makes two points: 1st. That he was prevented obeying the orders by the acts of the enemies of his sovereign, the Duke of Mecklenburg-Schwerin, and that the bill of lading contains an exception of the acts of the enemies of the Duke. 2nd. That the bill of lading was for the conveyance of goods on a voyage in respect of which there was a charter-party, and that the larger terms of the exception in the charter-party are incorporated with the bill of lading, and the default occurred through one of the perils excepted in the charter-party.

Mr. Mellish will probably be satisfied if we give judgment now only on the first point. The question depends on the construction to be put upon "the king's enemies" in the excepted perils in the bill of lading. We have to choose between three persons who are on an equality, as to satisfying the term "king," viz., the Emperor of Russia, the Queen of England, and the Duke of Mecklenburg-Schwerin. Strictly, no one of them can be called "king;" but the word here simply means a sovereign capable of making war, and on whom war can be made. There was abundant reason why the defendant who signed the bill of lading should stipulate for immunity from dangers from the enemies of his own king, and reasons which would not apply in the case of other kings; and therefore, I think he is the king intended. At any rate, "king's enemies" must include the enemies of the sovereign of the person who makes the stipulation. There must, therefore, be judgment for the defendant on the demurrer to the 5th plea.

BRYAN, J.—"King's enemies" will at least comprise the enemies of the sovereign of the carrier.

The exception of king's enemies and restraint of princes includes all interruptions by lawful powers. An interruption by pirates comes under dangers of the sea (2 Roll. Abr. 248, pl. 10; and *Pickering v. Barkley*, there cited; *Barton v. Wolkford*, Comberbach, 56).

KEATING, J., concurred.

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WILLES, J., stated that on the other point in the case, the Court considered that the exception in the charter-party was not incorporated into the bill of lading.

Judgment accordingly.

G. P.

25 JUNE, 10, NOV. 1864.

} HELPS and Others v.
} CLAYTON *et uxor*.

Costs of preparing Marriage Settlement by Lady's Solicitor—Infant—Settlement a necessary.

It is the custom of the profession that, in marriage settlements of personality, the lady's solicitor should prepare the deed, and that the husband should pay for it; and the retainer is that of the lady, or her parent, or some one standing in loco parentis to her: and, therefore, the husband is legally liable to indemnify whoever, on the part of the wife, has properly incurred expenses by such retainer.

A marriage settlement on a female infant, who has no certain provision without it, and who herself has no property to settle, is a necessary, so that she can bind herself by a contract to pay the costs of preparing it.

Declaration for money payable by the defendants for work done, materials provided, and money paid by the plaintiffs for the female defendant *dum sola* at her request.

Pleas, never indebted, payment, and the infancy of the female defendant; and replication to the last plea, that the debt was contracted in respect of necessities. Issue on the two other pleas and the replication.

At the trial, before Erle, C.J., a verdict was entered for the plaintiffs by consent, subject to a special case, the Court to draw inferences of fact.

From the case it appeared that the plaintiffs were attorneys, and that in the year 1862 the male defendant, Captain Clayton, was engaged to the female defendant, his present wife. She was then eighteen years old, and had resided with her father, Colonel Somerset, from her birth. On the 14th of August the lady's father called at the office of the plaintiffs, who had occasionally acted as his attorneys before, with a letter to him from Captain Clayton, in which the latter proposed to settle on his intended wife the sum of 10,000*l.*, and 100*l.* a year, adding, "I shall be much obliged if you will nominate a trustee; and I refer you to my solicitor, Mr. Barnard, of," &c. The father accordingly requested the plaintiffs to take the necessary

steps on the part of his daughter, and communicate with the trustee whom he had nominated.

The plaintiffs accordingly wrote to Mr. Barnard, the same day, informing him that they were instructed by the lady's father to prepare the settlement, upon which Mr. Barnard wrote back that Captain Clayton had some time before instructed him to do so, and that he had consequently already prepared the deed. To this the plaintiffs replied, that a marriage settlement on a lady was always prepared by her solicitor, and that the husband paid for it; and they offered to submit the question to the president or council of the Incorporated Law Society.

The matter was accordingly referred to Mr. Cookson, and he was clearly of opinion that it was the custom of the profession that the lady's solicitor should prepare the settlement, and that the husband should pay for it; and thereupon the plaintiffs prepared the settlement.

On the 1st of September one of the plaintiffs called on the lady at her father's house, to make an appointment for the execution of the settlement by her; and on the 8rd he and Mr. Barnard went to the father's house, and the lady and her father then executed the deed; but the plaintiffs had no other interview or communication with her on the subject. The marriage took place on the 4th of September, and in the following April the plaintiffs sent in the bill for preparing the settlement to Captain Clayton; but he refused to pay it, on the ground that he did not retain them. The plaintiffs were advised that, though Captain Clayton was liable, there was no privity between him and them; and, accordingly, the father gave his cheque for the amount of the bill, and sued the male defendant for money paid to his use. Before the trial, however, the plaintiffs, acting on advice that the action would not lie, and that in point of law the retainer was given by the lady, paid the money back to the father, and he abandoned the action. The plaintiffs then brought the present action; and the question for the Court was, whether the defendants were liable in it.

Gray, Q.C., argued for the plaintiffs, that they acted on the known usage in the profession, and gave credit to the husband; and that the lady knew the plaintiffs were acting for her.

Haywood v. Piott, 8 C. & P. 59;

that the payment was by mistake, and was, therefore, no payment; and that the marriage settlement was a necessary,

Chapple v. Cooper, 18 M. & W. 252;

Brayshaw v. Eaton, 5 Bing. N. C. 231.

[*WILLIAMS, J.*, referred to,

Rainsford v. Fenwick, Carter, 215.]

Huddleston, Q.C. (*Inderwick*, with him), for the defendants, argued, that there was no retainer by them; and that, if the marriage had not taken place, the plaintiffs would have looked to the father.

Smith v. Gibson, 2 Peake, 52:

Chitty on Contracts, p. 138 (6th ed.).

Gray, Q.C., was not called upon to reply.

Curr. adv. vult.

10 Nov. 1864.

WILLES, J., now delivered the judgment of the Court (*Willes, Byles, and Keating, JJ.*) as follows:—

This case was well argued at the sittings after Trinity Term by Mr. Gray for the plaintiffs, and Mr. Huddleston for the defendants. It was an action brought by solicitors to recover the costs of preparing a settlement upon the marriage of the defendants, claimed as a debt payable by the defendant, Mrs. Clayton, her husband being made a party for conformity only. The pleadings raise two questions: 1st., whether there was any debt incurred by Mrs. Clayton in respect of these charges; 2nd., whether, if incurred by her, infancy is a bar. The plea of payment was properly abandoned. These are the only questions, and they affect the liability of the wife alone. No question as to who is liable, if she is not, is directly in issue.

The marriage took place in September, 1862. At that time Mrs. Clayton was about eighteen, and up to that time she had from her childhood lived in her father's house as one of his family, and, as must be presumed in the absence of any statement to the contrary, upon the same terms as an unmarried daughter, without property of her own, usually lives under her father's roof, that is to say, at his expense. The settlement was altogether of personal property of the husband, viz., 10,000*l.*, and 100*l.* a year for pin money. It must be taken to have been a proper settlement, and such as was beneficial to the lady as well as the gentleman; and we should therefore feel little difficulty in dealing with the question of infancy, assuming that of retainer to be decided in favour of the plaintiffs. The instructions for the settlement were given to the plaintiffs by the lady's father, who had occasionally previously employed them as his solicitors. At the time, he handed them the letter of the intended husband proposing the settlement and referring to his solicitor. A correspondence ensued between the plaintiffs and the solicitor named by the husband, in which each claimed the right to prepare the settlement. In the end they agreed to refer the matter to Mr. Cookson, who decided that, beyond all doubt, the practice in the profession is, that the lady's solicitor should draw the settlements, adding, that the gentleman should have the privilege of paying for them. Of the correctness of this opinion as to settlements of personal property, such as that under consideration, no doubt was, or properly could be, suggested. Accordingly the husband's solicitor gave way, and the settlement was prepared by the plaintiffs under the direction of the trustee named by the father on behalf of the lady; and it was executed by both the defendants previous to their marriage. In allowing the

settlement to be prepared by the plaintiffs, the husband's solicitor acted, it is true, without any positive or express authority from his client; but he did so in the exercise of a just discretion, and acting within the scope, as it appears to us, of his retainer to act for the intended husband, which involved an authority to do what was right and usual on his behalf in the business.

We think the reference by Captain Clayton to his solicitor cannot properly be construed as excluding the ordinary usage. Indeed his employing a solicitor of his own in the first instance, if he thought the settlement was to be prepared by that gentleman, shows that he knew the expense was in some shape to fall upon himself. He might naturally employ a solicitor to see that the settlement, by whomsoever it was prepared, was properly expressed. His reference to his "solicitor, Mr. Charles Barnard," in his letter proposing the settlement, moreover, was of itself a warrant for the lady's friends to deal with Mr. Barnard as having authority, acting on his behalf, to do and consent to all that was right and usual in such a transaction, and no secret instructions could affect that *prima facie* authority. Therefore that Captain Clayton ought to pay the plaintiffs, we entertain no doubt; and we consider, further, that the duty to do so is not merely an honorary obligation on his part, but also a legal liability, arising out of the ordinary course of business, by which in such a case the solicitor employed on the part of the lady is to prepare the settlement, and the gentleman is to pay the bill.

In order to determine the present case, it will be necessary to consider, in the first place, the origin of this liability,—whether as upon an original liability of the husband to the solicitor, who is to be considered his for this purpose, or only as a liability to reimburse the expenses of the settlement which the lady, or her father, or person standing in the place of a parent, may have incurred. We think the latter to be the correct view. The employment of the lady's solicitor to prepare the settlement is not a mere compliment or matter of patronage; it has also the substantial object of satisfying the lady's friends that all proper care has been exercised on her behalf by some person in whom they confide, and of giving a remedy for negligence by action against the solicitor. He does not the less act as the solicitor of the lady or her parent, because the intended husband is to be ultimately liable, in the event of the marriage taking place.

The proper conclusion therefore is, that the retainer is to be considered as that of the lady or her parent, as the case may be, but that usage makes the husband liable to indemnify whoever on the part of the wife has properly incurred expense by retaining the solicitor to prepare a settlement, in the propriety of which the latter has so large an interest. This precise question is, as might be expected, bare of authority: but the ordinary case of a lease, which in practice is prepared by the landlord's solicitor and paid for by the tenant, furnishes an analogy. In such a case, if the landlord

pays upon the default of the tenant, the former may upon the usage maintain an action against the latter for the money paid, *Grisell v. Robinson* (3 N. C. 10; 3 Scott, 339). Such was the nature of the action brought by Colonel Somerset in this case, to which there was no answer if the retainer was by him on his own account, and not as agent on the behalf of his daughter. That action was abandoned upon the notion that in point of law the retainer was by Mrs. Clayton before her marriage, and that the claim, therefore, should be made in the present form.

From the above it follows that either the defendant was liable in the abandoned action, or that the defendants are liable in this. It further follows that the liability turns upon the question, whether the work was done upon the retainer of Colonel Somerset as acting for himself, or as agent for and on behalf of his daughter. In the former case judgment for the defendants, upon the ground that Mrs. Clayton is not liable, though Captain Clayton is: in the latter, judgment for the plaintiffs, upon the ground that Mrs. Clayton is liable.

The question upon which the decision of the case thus turns is one of fact, which a jury, upon ascertaining that Captain Clayton was at all events ultimately liable, would probably make short work of. The parties, however, have substituted the Court for the jury: and we are bound to give a verdict upon that question of fact in accordance, so far as the form of the question allows, with the merits of the case, and such as, if given by a jury, we should not have felt dissatisfied with, or set aside as being contrary to the weight of evidence. Now the evidence to make out that Colonel Somerset was the proper and only client of the plaintiff's, was his instructing them in person in the first instance, and naming the trustee, taken in connection with the fact that the young lady was a minor, and a member of her father's family, living, as to all ordinary wants, at his expense. The evidence to prove Mrs. Clayton liable, on the other hand, was that the instructions were given by her father and by the trustee on her behalf; that, knowing, as she must have done, that a settlement was being prepared, she authorised and ratified those instructions by signing the settlement when prepared; and that after all she was the person most and principally interested. The expense thus incurred was not part of the ordinary continuous outgoings for clothing, food, and such like, for which the pater-familias would have the bills sent into him as a matter of course. It was an occasion of a single and, though not extraordinary, exceptional character, in which it was not unreasonable or improbable that the person to be chiefly benefited should incur a liability, which the fact of the marriage would transfer to the shoulders of the person who ultimately ought to bear it.

In these circumstances we think it may justly be concluded, that there was a retainer by Mrs. Clayton as principal, through her father, who acted on her

behalf as her agent, and disclosed his principal at the time.

Upon the remaining question, that of infancy, we have already stated our opinion. The principal contract of marriage was one which it was competent for an infant to enter upon. She had no property to settle, and would have had no certain provision without the settlement, and the preparation of the settlement was therefore beneficial, as securing to her at her election a proper provision, which may justly be considered a necessary suitable to her estate and condition. It would be a perversion of the law for the protection of infants to hold that, under these circumstances, an infant could not contract for the preparation of such a settlement. Whether the provisions in the settlement may be said absolutely to bind her, it is unnecessary to consider, because, so far as all other parties are concerned, she is thereby secured against want. For these reasons our judgment is for the plaintiffs.

Judgment for the plaintiffs.

C. P. } POWELL v. JONES.
22 Nov. 1864.

REGISTRATION APPEAL.

Borough Franchise—Compounded Rates—Payment of Rates—Appropriation of Payment.

A, who claimed to be registered under 2 Will. 4, c. 45, s. 27, was the owner and occupier of a house, and also the owner of two adjoining houses. Some years ago he compounded under a local Act for the poor-rates of all three houses for one year, and thereby the assessment on the house he occupied was reduced one-half; and up to July, 1864, his assessment was continued on the same reduced scale, though there was no fresh composition. After the one year, and before the 31st of July, 1863, the house he occupied was improved so as to be worth more than 10l. a-year; and in October, 1863, he claimed to be separately rated, and to the full rate, for such house, expressly to get a vote; but he did not tender his arrears of rates, and his rating was not altered. The rate on the said house made in October, 1863, was a compound rate. After this, and before the 20th of July, 1864, he paid a sum sufficient to satisfy all rates due on such house up to the 5th of January previous, though not sufficient to satisfy what was due on all the houses. He did not expressly appropriate the payment, which was set against all the rates due from him:—

Held, that the rate being prima facie valid, and only reversible on appeal, he was, under the circumstances, sufficiently rated in respect of such house, and had appropriated his payment, and paid the rates.

This was an appeal from a decision of the revising barrister for the borough of Kidderminster, who stated the following case:—

William Jones occupied in Saint John Street, in the parish of Kidderminster borough, for twelve calendar

months previous to the last day of July in the present year, a house and garden of upwards of the clear yearly value of 10l. He was the owner of the said house and garden, and also of two adjoining houses. Some years since, under the provisions of an Act, 4 & 5 Vict. c. lxxii., intituled, "An Act for better assessing and collecting the poor-rates in the borough of Kidderminster, in the county of Worcester," he compounded with the overseers for the said borough for the poor-rates of the above houses for the term of one year; and by entering into such composition, only one-half of the amount was assessed on the said house and garden for poor-rates as would have been assessed thereon if the said William Jones had not entered into such composition. At the expiration of the year for which such composition was entered into, and down to the month of July last inclusive (the July rate being made and allowed on the 22nd day of that month), the overseers continued to assess the said house and garden on composition, although the said William Jones did not enter into any composition agreement with them other than as above stated; neither did he attend any meeting of the overseers for the purpose of entering into any other composition agreement; but the demand made by the overseers, and the receipt given by the collector, stated that the rates were composition poor-rates. Subsequently to his entering into such composition as aforesaid, and previously to the 31st day of July, 1863, he made improvements to the said house and garden, by which the clear yearly value thereof was raised to upwards of 10l.

In the compound poor-rate made and allowed the 15th of October, 1863, which was the first rate made after the 31st of July preceding, the gross estimated rental of the said house and garden was put at 5l. 10s., and the rateable value at 3l. 5s.; and the gross estimated rental of the said other two houses was put at 4l. each, and the rateable value at 2l. 10s. each: the amount of the rate assessed upon and payable by the owner instead of the occupier, by virtue of the statute or statutes in that behalf, was, for all three houses, 4s. 9d., viz., 1s. 10½d. for the said house and garden, and 1s. 5½d. each for the other two houses; recoverable arrears, 1l. 3s. 9d.; total amount to be collected, 1l. 8s. 6d.; amount actually collected, 10s.; recoverable arrears at balancing in the books, 18s. 6d.

The said William Jones, in October, 1863, but he could not state the precise day, claimed to be rated separately from the said two other houses, and to the full rate, for and in respect of the house and garden in his occupation, for the purpose, as he then stated to the overseer, of getting his vote; but he did not at the same time pay or tender the arrears of rates then due. The overseer did not alter the rating in respect of the said house and garden in the occupation of the said William Jones.

The said William Jones subsequently to his claiming to be separately rated as aforesaid, and previous to the 20th day of July in the present year, paid to the

overseers of the said borough the sums of 10s. and 12s. 6d., making together, 1l. 2s. 6d., which was more than was sufficient to pay all rates due previously to the 5th day of January last, in respect of the house and garden in his own occupation; but at the time of making such payment he did not state or specify to what rate, or in respect of which houses, he paid the said amounts, and the collector placed the amount against all the rates due, viz., 1l. 8s. 6d.

It was objected on behalf of the said Richard Powell, that the name of the said William Jones should be expunged, inasmuch as he had not been rated, in respect of such house and garden, to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of such his occupation as aforesaid.

2nd. That he had not paid the poor-rates payable from him previously to the 5th day of January on or before the 20th day of July in the present year.

I held that he was rated, in respect of such house and garden, to all rates for the relief of the poor in such parish of Kidderminster borough made during the time of his occupation; and that he had paid the poor-rates payable from him previously to the 5th day of January on or before the 20th day of July in the present year, and accordingly retained his name on the list of voters.

If the Court shall be of opinion that, under the circumstances stated, the said William Jones was not rated in respect of such house and garden to all rates for the relief of the poor during the time aforesaid, or that he had not paid the poor-rates payable from him previously to the 5th day of January on or before the 20th of July in the present year, then the name of the said William Jones is to be expunged from the list of voters, and the register of voters is to be altered accordingly.

If the Court shall be of a contrary opinion, the register of voters to remain unaltered.

Keane, Q.C., for the appellant.

The respondent has not paid his rates: he was not legally rated, and should have appealed under

17 Geo. 2, c. 38, s. 4.

The case of

Rez v. George, 6 Ad. & E. 305,

only shows that he could not appeal if he had not been rated at all.

He did not expressly appropriate his payment; and where there are distinct debts, and a general payment on account, the creditor may appropriate the payment to which account he pleases; and if he does not do so, the law appropriates it to the earlier debts. No doubt the debtor may appropriate his payment as effectually by conduct as by words; but the barrister does not find any such appropriation, but merely allowed the vote on the facts.

Karslake, Q.C., for the respondent, was not called on.

ERLE, C.J.—It seems that the respondent was rated, and that it was a valid rate; we should take it *prima facie* to be valid. Mr. Keane's argument is, that if the other party does not appropriate his payment, the receiver has a right to do so, and that he has done so here. But express words are not necessary to the appropriation by the payer. It is clear to my mind, that the respondent desired to be qualified, and knew that he ought to pay his arrears of rates, and that he did accordingly pay them.

BYLES, J.—I am of the same opinion. The rate was only reversible on appeal, and we must take it to be valid. There is no doubt as to the intention of the payer, and, I think, as little that the other party knew that intention.

KEATING, J., concurred.

Judgment for respondent.

C. P. } *TEPPER*, Appellant, v.
23, 24 Nov. 1864. } *NICHOLS*, Respondent.

REGISTRATION APPEAL.

Coram—*ERLE, C.J.*, and *KEATING, J.*

Shareholders in Bridge—Whether Equitable Freeholders—Acts appointing Commissioners for Public Purposes—No Power to convey Lands.

By statute 12 Geo. 1, c. 36, Commissioners were appointed for building and maintaining Putney Bridge; certain persons under disabilities were enabled to convey lands to the Commissioners or their successors, or as they should appoint; the Commissioners might be incorporated, and might (then) hold and aliene lands, the Commissioners were empowered to take tolls, and to convey the same as security for money advanced for the bridge, or to grant annuities for lives or for twenty-one years out of the tolls; the materials were to belong to the Commissioners, and before the bridge was built satisfaction was to be made to the owners of certain ferries.

By statute 1 Geo. 2, c. 18, the Commissioners were empowered to contract with any persons for building the bridge, to grant annuities in fee out of the profits and tolls, and to convey the tolls and profits to persons contracting to build and maintain the bridge, and, after satisfaction given to the owners of the ferries (which was done), the ferries and passage over the river and ground adjacent were to vest in the Commissioners.

By deed of the 11th November, 1729, the Commissioners granted to trustees the bridge and materials, tolls and profits, with all ground and soil adjacent, vested, or to be vested, in the Commissioners, in trust to permit thirty persons, who had subscribed 1000l. each for the bridge, to receive the tolls and profits on certain conditions, since performed, to be divided rateably amongst them as tenants in common.

By deed of the 16th June, 1780, the Archbishop of C granted to the proprietors part of Putney Churchyard for an approach to the bridge.

The appellant claimed a vote as holder of part of one of the thirty shares, which had always been treated as freehold estate.

The bridge was built partly on piles and partly on brick foundations at each end:—

Held, that the Commissioners had no power to convey the land to trustees for the shareholders, and that the shareholders took no more than what might lawfully be conveyed, and therefore that they did not take the land, and had not votes as equitable freeholders.

This was a consolidated appeal from a decision of the revising barrister for the eastern division of Surrey.

The case for the opinion of the Court was in effect as follows:—

The appellant and the other claimants, stated as the nature of their qualification, that they were respectively the holders of certain parts of one thirtieth share in the Fulham and Putney Bridge.

By statute 12 Geo. 1, c. 36, s. 1, certain Commissioners were appointed for designing, directing, ordering, and building a bridge across the river Thames, from the town of Fulham, in the county of Middlesex, to the town of Putney, in the county of Surrey, and for maintaining, preserving, and supporting the same when built, and they were empowered to design, assign, and lay out, how and in what manner the said intended bridge should be made, erected, and built, and the ways and passages to and from the same, and to preserve and keep in repair such ways and passages from time to time, and to make contracts, and do all manner of things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly.

Section 2 required that an open passage of 700 feet should be left for the water.

Section 5 enabled persons under disabilities to sell and convey to the said Commissioners or their successors, or as they should appoint, all or any houses and ground which they should be seized or possessed of, or interested in, or any part thereof, for the purposes aforesaid, and that all contracts which should be made for such purposes should be valid.

By section 7 it was enacted, that His Majesty might incorporate the said Commissioners, and that they and their successors should be able to have and purchase messuages, lands, rents, tenements, and hereditaments, and also to sell, grant, demise, alien, or dispose of, the same, or any part thereof . . . and to do and execute all and singular other matters and things that to them should or might appertain, with such powers and clauses as should be necessary or requisite for erecting, building, and supporting the said bridge, and the ways and passages thereto from time to time.

By section 10, the Commissioners were empowered to take tolls for passing over the said bridge.

By section 13, the Commissioners were empowered by indenture, or writing, under their common seal, to convey and assure the toll by the said Act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed, for the ends and purposes aforesaid, to any person or persons advancing the same, for securing the repayment thereof with interest at 5l. per cent., or to grant annuities for lives, or for twenty-one years, payable out of the tolls.

By section 14, such annuities were to be personal estate.

By section 16, the Commissioners were empowered from time to time to remove shelves and deepen the river.

By section 17, all stones, bricks, planks, piles, and other materials, used for making the bridge, were to belong to the Commissioners and corporation aforesaid.

Section 18 enabled the Commissioners to set up a temporary ferry in the event of the bridge being damaged.

By section 19, the bridge was not to be built till satisfaction should have been made as therein mentioned to the owners of the then present ferries.

By section 22, nothing in the Act was to prejudice or take away the right, property, or jurisdiction of the Mayor, or of the Mayor, commonalty and citizens of the City of London, to, in, and upon, the said river, other than, and except to do, everything necessary for erecting and maintaining the said bridge.

By statute 1 Geo. 2, c. 18, s. 1, the Commissioners were empowered to contract and agree with any person or persons to erect and build the bridge, and to grant annuities in fee out of the profits, incomes, revenues, or tolls of the said bridge; such annuities to be assignable, and to be deemed personal estate.

By section 3, the Commissioners were empowered to convey and assign over, in perpetuity or otherwise, all or any tolls, revenues, profits, or incomes of or belonging to the said bridge or ferries, or which should in anywise arise, accrue, or belong to the same, unto such person or persons as would contract to erect and build the said bridge, and to keep the same in repair, and should give security so to do.

By section 5, the Commissioners were not to build the bridge without consent of the proprietors of the horse ferries, without satisfaction made to such proprietors. If such consent should be given, the bridge and tolls are to be in the first place chargeable with the sums to be paid to such proprietors. Upon payment thereof, all ownerships, properties, and interests of, in, or to the ferries, were thereby extinguished; and the said ferries and passage over the river Thames there, and the ground and soil adjacent and belonging to the said respective ferries, were transferred to, and absolutely vested in, the said Commissioners.

Previously to November, 1728, the rights and interests of all parties in the ferries referred to in the said Acts, were satisfied by the Commissioners.

On November 19, 1728, a contract was entered into between the Commissioners and thirty persons who had subscribed 1000*l.* each, whereby the said thirty persons contracted to build and maintain the bridge, and the ways and passages thereto, and make the said purchases and payments required by the said Acts. In pursuance of this contract, the said thirty persons did build the said bridge, and make the said purchases and payments.

By indenture of bargain and sale, dated the 11th of November, 1729, duly enrolled in Chancery, between the said Commissioners of the first part, the said thirty persons being all the contractors and subscribers for building the said bridge of the second part, and certain persons as trustees of the third part. The Commissioners granted to the trustees, their heirs, and assigns, for ever, the said bridge, and all the materials wherewith the same was erected and built; and all tolls, revenues, profits, and incomes, of or belonging to the said bridge so built, or the ferries thereafter to be set up as occasion might be according to the said Acts, or which should in anywise arise, accrue, or belong to the same, with all such ground and soil adjacent and belonging to the then late or then present horse ferries, and passage over the said river as had been, was or should be vested in the said Commissioners; and all benefits, advantages, powers, privileges, and authorities; and every other matter and thing whatsoever vested in, or granted to, the said Commissioners, which they were empowered or capable to assign and convey over, by virtue of the said Acts, or either of them, to hold unto and to the use of the said trustees, upon trust to permit and suffer the said thirty persons, their heirs, and assigns, to receive and take the said tolls, revenues, profits, and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed (which condition had been performed), and after payment of such sums should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenue, profits, and income of the said bridge and ferries, and other the premises, if any, unto and amongst the said thirty subscribers and proprietors for the time being, and their respective heirs and assigns, rateably according to their subscriptions; and, according to their several and respective rights and interests, to have, take, and enjoy the same as tenants in common.

Proviso: That if the profits should be insufficient to keep the bridge in repair and to pay all things aforesaid, and the charges of the trustees in the execution of the trusts, such sums should be paid and borne rateably by the thirty.

By deed of the 16th of June, 1730, the Archbishop of Canterbury granted to the proprietors of the Putney

Bridge 200 superficial feet of land, part of Putney churchyard, for the purpose of making the passage to and from the said bridge more commodious, and the same was used for that purpose, and when the case was stated formed part of the approach to the bridge.

There was no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors, except what was comprised in the deeds of the 11th of November, 1729, and the 16th of June, 1730.

No evidence was adduced before the revising barrister as to the annual value of the said lands.

The interest of the present shareholders in the bridge (about eighty in number) was identical with the interest vested in the said thirty persons under the said deeds, and had always been conveyed and transmitted and dealt with as freehold estate.

The proprietors managed their own affairs.

The persons objected to were respectively holders of a share, or part of a share, of such interest as aforesaid, and the sufficiency of the annual money value of such share or part of a share was not in dispute.

The bridge was built partly on piles in the river, and at either end upon brick foundations, which stood respectively upon that part of the banks between high and low-water mark, whence formerly the ferries used to ply, and in part on land formerly adjacent and belonging to the said ferries. A brick toll-house stood at each end of the bridge on the brick foundation.

It was contended on the part of the claimants, that they had, under the two Acts and the two deeds above-mentioned, such equitable freehold estates in the said bridge tolls and other property comprised in the said acts and deeds as entitled them to votes.

The objector denied this, and also contended that the individual shareholders were members of a company, and so only entitled to a share of the rents and profits.

The barrister allowed the objection subject to the present case.

The question for the Court was, whether the claimants were entitled to votes.

Karslake, Q.C. (*Beresford* with him), for the appellants.

The sufficiency of the annual value of the shares is not in dispute. It is admitted that if these thirty persons have any estate, they have a forty-shilling freehold.

The Commissioners originally had an interest in the soil, and they have assigned it to trustees in trust for these persons, who have advanced money for building the bridge. As *cestui-que-trusts*, therefore, these persons have an equitable freehold so as to entitle them to votes.

The Commissioners took an estate, not a mere easement.

The conveyance of this estate by the Commissioners was not *ultra vires*.

At all events the shareholders have had the enjoyment of the bridge since 1729, and so have a freehold.

He cited,

Rogers' Elections, 135 (7th ed.);

Baxter v. Brown, 7 Man. & Gr. 198.

Raymond, for the respondent.

1st. No part of the soil vested, or was intended to vest, in the Commissioners.

Section 17 of the first Act shows that without it the property in the materials would vest in the owners of the soil.

The Act conveyed no more to the Commissioners than was necessary for carrying out the objects proposed,

Badger v. South Yorkshire and River Dun Navigation Company, 1 El. & El. 347.

[ERLE, C.J.—I do not remember a permanent structure on land held to be an easement.]

The bed of a river differs from ordinary land. The Commissioners owned the piles, but not the soil,

Lancaster v. Eve, 5 C. B. (N. s.) 717;

Wood v. Hewett, 8 Q. B. 913.

2nd. Even if the Commissioners had an interest in the soil, they did not and could not convey it to the shareholders. It was *ultra vires*. Besides, the deed only purported to convey the bridge to the trustees in trust, to permit the *cestui-que-trusts* to have the tolls and profits on certain conditions.

3rd. If these shareholders have any interest in the soil, they have it virtually as a corporation. Each individual has not a vested estate in the land,

Bennett v. Blain, 33 L. J. C. P. 63;

Bligh v. Brent, 2 Y. & Coll. 268.

The Act creates a trust or duty for the public good, *Regina v. Stratford-upon-Avon*, 14 East, 348.

Karslake, Q.C., in reply.

Cur. adv. vult.

24 Nov. 1864.

ERLE, C.J., now delivered the judgment of the Court.

By the Acts relating to Putney Bridge, Commissioners were appointed, and certain lands were, by virtue of these statutes, conveyed to them, to carry out that object. Then they conveyed these lands to trustees, to divide the profits of the said lands and the tolls of the bridge among the shareholders; and, if the Commissioners had the power to do this, there is no doubt that the shareholders are equitable freeholders as to these lands. But I think the Commissioners had not the power. I take it to be clear Law, that when land is vested in Commissioners for public purposes, the Commissioners have not power to convey away part of such land. The second Act enabled

the Commissioners to convey the tolls, as distinguished from the fee simple of the lands, to the shareholders. That appears to me to be a negation of the right to convey the lands. I think, therefore, the Commissioners had not power to convey the lands to trustees for the shareholders. Then they did convey, in 1729, but if the land was taken under that title, the shareholders acquired nothing but what might be lawfully conveyed. In 1729 the Commissioners had no power to convey, and if the shareholders then took the land under that conveyance, they took it with notice under these statutes, that the Commissioners had no power to convey it to them. The shareholders, therefore, did not take the land, and consequently had no votes.

Judgment for the respondent.

Bail Court. } REGINA v. THE CORONER OF
25, 30 Nov. 1864. } DOVER.

Coroner—Adjournment of Court—Inquisition.

Where a coroner, proceeding by inquisition, adjourns the Court to a day named, and neglects to hold the Court on that day, the proceedings cannot afterwards be resumed.

The signatures of the coroner and the jury must be attached to the inquisition at a Court duly constituted.

On a previous day in term, *Henry James* obtained a rule, calling upon the Coroner of Dover to show cause why a *certiorari* should not issue to remove an inquisition taken before the said coroner, on view of the body of *Susannah Lock*, on the ground that the inquisition was held, and the verdict thereon taken, *coram non judice*.

The inquest was held on the 2nd of August, 1864, and the proceedings were regularly conducted up to the 5th of August. On that day, all the evidence having been taken, the jury returned their verdict. The coroner desired time to have the inquisition prepared, and adjourned the inquest to the 8th of August. The jurors were bound over in recognisances to attend on that day to sign the inquisition. On the 6th of August, the coroner, finding that he could not have the inquisition drawn up by the 8th, wrote a letter to the summoning officer ordering him to inform the jury that the inquest was further adjourned for a day or two. No Court was held on the 8th; and on the 12th the coroner and jury met and signed the inquisition.

Francis now appeared to show cause. The jury had returned their verdict, and no adjournment was necessary. The signatures of the coroner and jury may be attached to the inquisition at any time,

Burns' Justice, title "Coroner."

At all events no formal adjournment was necessary. What was done amounted to an adjournment.

Henry James, in support of the rule. The signing of the inquisition is a most important part of the proceedings. When the inquiry is once dropped, it cannot be resumed,

Jervis on Coroners, 325.

Cur. adv. vult.

30 Nov. 1864.

SHEP, J., delivered judgment.—It is of great importance that the duties of coroners in the holding of inquisitions *super visum corporis* should be conducted with the observance of those forms which have been established to ensure regularity. The forms of adjourn-

ment are requisite to secure the re-attendance of the jurors after an adjournment, at the time and place appointed, and to preserve the continuity of the proceedings from the first meeting of the inquest until its completion, by the signing of the inquisition. If the coroner had taken the trouble as it was his duty to do, of holding the Court on the 8th of August, and had then again adjourned the inquest to a day certain, all would have been right; but not having done so, the final and important proceeding of adopting and signing the inquisition did not take place under the original precept, and was *coram non judice*.

Rule absolute.

EQUITY.

Lord Chancellor. } *Re* HOLFORD.
17 DEC. 1864. } *Ex parte* HOLFORD.

Bankruptcy—Appeal—New Evidence.

New evidence ought not to be received on an appeal in bankruptcy, unless under very special circumstances.

In general, where a party relies upon new evidence, the proper course is to apply to the Court below for a rehearing.

This was an appeal in bankruptcy.
On the opening of the case,

Bacon, Q.C. (Bardswell with him), for the appellant, asked leave to adduce new evidence.

Daniel, Q.C., and North, for the respondents, objected to its introduction.

THE LORD CHANCELLOR said, that, as a general rule, the Court of Appeal ought to exercise its judgment on the same materials as those submitted to the Court below. New evidence ought not, therefore, to be admitted, unless there were very special circumstances requiring such a course, as, for instance, where a party had been surprised, and something brought forward which, had the party known of before, he could have met. The contrary practice would in effect convert the Court of Appeal into a Court of first instance. The proper course here would be for the appellant to apply for a rehearing to the Court below, which had full power to grant one, wherever the justice of the case seemed to demand it.

The case would stand over with liberty to the appellant to make such application to the Commissioner as he should be advised.

Lord Chancellor. } *Re* SHELLEY.
17 DEC. 1864. } *Ex parte* STEWART.

Bankruptcy—Joint-Stock Company—19 & 20 Vict. c. 47, ss. 19, 23—Equitable Mortgage of Shares—12 & 13 Vict. c. 106, s. 125—Order and Disposition—Notice to Company.

A was the managing director and secretary of a company incorporated under the Joint-Stock Companies Acts, 1856 and 1857, and he and five others were the only directors. Under a common arrangement, entered into by all the directors, A, to the knowledge of each of the other directors, deposited the certificates of certain shares, which he held in the company, with a bank to secure the repayment of a sum of money advanced for the purposes of the company. No further notice of the

deposit was given to the company, and the articles of association specified no particular person to whom, or manner in which, notices addressed to the company should be given. A having become bankrupt:—

Held, that the transaction itself imported sufficient notice to the company to take the shares out of A's order and disposition.

The object of the 19th section of the Joint-Stock Companies Act, 1856, is, merely to prevent the company being bound, by notice of equitable dealings, and neither that section nor the 23rd prevents the shareholder from making a valid equitable mortgage of his shares.

Observations on Ex parte Boulton, Re Sketchley, 2 De G. & J. 163.

The Victoria Silver, Lead, and Zinc Company (Limited) was a company duly incorporated under the Joint-Stock Companies Acts, 1856 and 1857, and at the time of the transactions hereinafter mentioned, Edward Shelley was the managing director and secretary, and he and five other persons constituted the entire number of directors.

In May, 1862, Edward Shelley, on behalf of the company, applied to the Stourbridge and Kidderminster Bank for the loan of 2,500*l.* This sum the bank agreed to advance, upon the directors giving them a promissory note for the amount and interest, and depositing with them, as a further security, shares amounting in the aggregate to the number of 300. Of the shares thus deposited 105 belonged to Edward Shelley.

In November, 1862, the note was renewed, and a further sum of 2,500*l.*, advanced upon a similar note. At the same time, 230 additional shares contributed by the various directors, of which number 100 belonged to Edward Shelley, were deposited with the bank; and the total number of the 530 shares was made a collateral security for the repayment of the two advances.

The money thus obtained was wholly applied to the purposes of the company, and both the deposits were made with the knowledge of all the directors.

In July, 1863, Edward Shelley was adjudicated a bankrupt, and at the time of the bankruptcy the 205 shares deposited by him were still standing in his name in the share register.

The promissory notes having been dishonoured at maturity, Robert Stewart, as one of the registered public officers of the bank, presented a petition to the Birmingham Court of Bankruptcy, praying for a sale of the shares deposited by the bankrupt, and that the proceeds might be applied towards liquidating the debt due to the bank.

The petition having been dismissed with costs, Robert Stewart now appealed.

Bacon, Q.C., and De Gez, for the appellant.

It will be contended, that, as the bank omitted to give formal notice of the deposit, the shares remained in the order and disposition of the bankrupt, with the consent of the equitable mortgagee. But such a notice would have been of no use, as every one to whom it could possibly be given was already fully cognisant of the transaction.

Their argument was then stopped by the Lord Chancellor, whereupon,

Daniel, Q.C., and Little, for the assignees, contended,

1st. The mere fact that an individual who, as an officer of the company, ought to receive notice, has already knowledge of the transaction, is not enough. His successor would not necessarily have the same knowledge,

Re Sketchley, Ex parte Boullon, 2 De G. & J. 163;

Ex parte Hennessey, 2 Dr. & War. 555;

Thompson v. Speirs, 13 Sim. 469; overruling,

Duncan v. Chamberlayne, 11 Sim. 123.

2nd. The policy of the various Companies Acts is, to make the register conclusive evidence of ownership ;
see

19 & 20 Vict. c. 47, ss. 19, 23.

The bank, which must be presumed to have known this, do not, as they could, insist upon having a legal transfer ; but permit the bankrupt to continue ostensible owner. They must, therefore, submit to the consequences which the law fastens upon such conduct.

THE LORD CHANCELLOR, without calling for a reply, said, that this was a case between the appellant, a purchaser for value, and the assignees of a bankrupt. It was a well-known rule, that the assignees took the bankrupt's property subject to all its equities, and, therefore, as a general conclusion, subject to any contract for valuable consideration entered into before the bankruptcy. Here there was a deposit by way of equitable mortgage to secure money advanced before the bankruptcy, which was a dealing for value. The right of the appellant was therefore clear, unless one of two reasons alleged against it was valid. The first was this : it was said, that the right of the appellant as purchaser for value, was excluded by the Bankruptcy Act of 1849, which required persons taking an equitable mortgage of shares, to give notice to those who might be called the depositaries of the property, and to whom application would be made to ascertain what the bankrupt's property was. The 125th section of that Act applied to cases where property was left in the possession, order, or disposition of the bankrupt, by the consent and permission of the true owner. By a long adopted construction, the fact of a person who had an equitable right not giving notice to the person in whose

hands the property might be considered as resting was a ground for inferring a permission that the bankrupt should be the apparent owner. It was obvious, that a mere neglect was not really the same thing as consent. But, nevertheless, it had been held, that the neglect of the vendee or mortgagee was a sufficient proof of a permission to the bankrupt. That being so, the question came to this, Was there here that neglect, which would lead to the inference that the bankrupt was apparent owner, with the consent and permission of the true owner ?

In the first place, he would dispose of the objection based upon the 19th section of the Companies Act of 1856. That section, it was urged, put it out of the power of a mere equitable mortgagee to give available notice, since the Act forbade the reception of it ; and, if so, no effectual equitable mortgage could be made. This, however, was not the effect or intention of the enactment. Its purpose was, that the title to the shares in the company's books should be wholly unincumbered, and clear from any notice of equitable dealings. Were it otherwise, the company would be greatly embarrassed, and would not know whom to summon to their meetings. The object, therefore, was, that the company itself should not be bound by any trust, express, implied, or constructive ; and that no notice should operate against the company. A similar rule had long before been adopted in reference to the books of the Bank of England. The 23rd section, to which reference had been made, did not carry the matter any further.

There being, therefore, nothing to prevent an equitable transfer from being guarded by a notice to the company, the case was reduced to the question, whether there was here such a notice involved in the transaction itself, as rendered it impossible to say, that the bank permitted the shareholder apparently to continue owner ? In other words, ought the bank to have given any further notice ; because the allowing a person to be apparent owner was inferred from the equitable owner neglecting to give notice. But was any such neglect imputable to the bank ? Could they have rendered the fact more patent, than the thing itself made it, to the very persons to whom notice would have to be given ? It did not appear that the articles of the company prescribed any particular person to whom, or manner in which, notice was to be given. So that it might properly be given to the secretary, as agent, or to the directors, as managers, of the company ; and no particular form was necessary, though the notice must convey knowledge of the fact.

Now, looking at the circumstances of the present transaction, it would be impossible for the directors to disregard it, as not concerning the company. It was authorised by the constitution of the company, and referred to the management of its affairs. In short, it was a "company transaction." Could the bank have possibly affected any mind more fully than those of the directors were already affected ?

But, then, it was said, that the judgment of the Lord Justice Turner, in *Re Sketchley* (*loc. cit.*), opposed this view. In that case, however, there were two secretaries, one of whom deposited his shares as an individual, and it was held that his personal knowledge was not enough, as it was possible to have given notice to the other secretary; and the Court seemed to consider that he would have been a more proper person to receive it. But here the case was different: there was but one secretary; the deposit was part of a "company transaction," in which all the directors and the only secretary joined. Without, therefore, expressing any opinion on the language attributed to Lord Justice Turner, he considered, that that case did not interfere to prevent his giving the decision, which in the present case was just—namely, that here there was no neglect on the part of the bank; since they could not have given a more effectual notice than was derived from the transaction itself, or have affected any other persons than those whom it actually affected. No consent, therefore, to the bankrupt's remaining apparent owner could be implied. It would have been a mere superfluity to write a formal letter, when every individual to whom it could be sent, already knew all it could contain. The appellant, therefore, would be declared to have a valid equitable mortgage of the shares.

Lord Chancellor. } *Re KING.*
17 DEC. 1864. } *Ex parte KING.*

Bankruptcy—Trust Deed—Trustee Refusing to Execute—Registration—24 & 25 Vict. c. 134, s. 192.

Where a person, appointed one of three trustees by a deed intended to operate under the 192nd section of the Bankruptcy Act, 1861, refused to execute the deed:—

Held, that the Court had no power to order the deed to be registered.

This was an application in the matter of a trust deed.

The debtors, who were builders, had summoned a meeting of their creditors, at which it had been resolved that they should execute a deed under the 192nd section of the Bankruptcy Act, 1861, and two of the creditors were chosen trustees. Before the meeting separated, however, the attorney of a third creditor, Booth, suggested that Booth's name should be added to those of the two trustees already chosen. This was agreed to, and Booth and the two other creditors were accordingly appointed trustees by the deed. Booth now, however, refused to execute the deed.

The second rule of the 192nd section provides that "if a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same."

Under these circumstances, the Registrar refused to receive the deed, and an application to the Court of Bankruptcy to dispense with Booth's execution was dismissed.

Reed now made a similar application.

THE LORD CHANCELLOR said, the application could not be granted. It was unfortunate that in the present case a difficulty should be caused by the improper suggestion of Booth's attorney. He ought to have first ascertained that Booth was ready to act. The statute had a difficult task to perform, that of determining when the agreement of a certain proportion of the creditors should bind the whole number, so that in certain cases something might be introduced more advantageous, and less expensive, than a bankruptcy. To a certain extent that task had been accomplished. There were necessarily many defects inherent in the machinery, but in most cases they were aggravated by the carelessness and want of attention of the parties concerned. Here the parties had assumed the consent of Booth, and felt aggrieved, because the express terms of the Act were adhered to. It was evident that Booth had been appointed a trustee, and as he had not executed, the conditions of the Act were not complied with, and the deed was not such as could acquire validity under the Act. Registration would, therefore, be improper, and if allowed, would not make the deed binding upon the dissentient creditors. There was no power to remedy this conclusion; to do so would, in fact, be to repeal a provision of the Act.

Lord Chancellor. } *Re GROOMER.*
20 DEC. 1864.

Bankruptcy—24 & 25 Vict. c. 134, s. 200—Form of Certificate—Discretion of Court.

The sufficiency of the affidavit or certificate to be given under the 200th section of the Bankruptcy Act, 1861, is in the discretion of the Commissioner, and the Court of Appeal will not interfere.

In this case a debtor had executed a trust deed, in the form given in Schedule D to the Bankruptcy Act, 1861; but, being unable to obtain the assent of the requisite majority of his creditors, by reason of bills and other negotiable securities being outstanding, had complied with the conditions of the 200th section. The Court of Bankruptcy, however, refused to allow the trustees' certificate, on the ground that it did not appear thereby, that sufficient efforts had been made to ascertain the holders of such bills and securities.

Bacon, Q.C., moved that the certificate might be allowed.

THE LORD CHANCELLOR said, that the appeal related to a matter resting wholly in the discretion of the Commissioner. The certificate must state, that the debtor was unable to ascertain by whom the bills of exchange were holden; and the Commissioner had required the trustees to set forth the grounds on which they certified such inability. The Commissioner was,

in fact, not satisfied with the form of the certificate : and the trustees must put the certificate into such a form as the Commissioner could approve of.

Lord Chancellor. } *Re LEVI.*
20 Dec. 1864. } *Ex parte LEVI.*

Bankruptcy—24 & 25 Vict. c. 134, ss. 159, 221-223—Criminal Proceedings—Form of Order—Previous Examination of Bankrupt.

The Court of Bankruptcy may order a bankrupt to be prosecuted before the time appointed for hearing his application for an order of discharge.

Form of order for prosecution, referring to "one or more of the offences set forth in the 221st section," approved of.

It is in the discretion of the Court to allow or not to allow the bankrupt to be examined before making such order.

On the 12th of November, 1864, Morris Levi was adjudicated a bankrupt. By an order of the Court of Bankruptcy for the Birmingham district, dated the 18th of November, 1864, after stating that it appeared to the Court that the bankrupt had been guilty of one or more of the offences set forth in the 221st section of the Bankruptcy Act, 1861, it was ordered, on the application of the petitioning creditors, that criminal proceedings should be forthwith commenced, instituted, and prosecuted against the bankrupt for, and in respect of such offence or offences. The petitioning creditors were directed to act as prosecutors, and the Court granted them a certificate under the 223rd section.

The bankrupt moved by way of appeal, that this order be discharged.

By his affidavit, filed in support of the motion, he stated, that he had never filed any accounts, nor had he been allowed to file any, or to give any explanation, and that all the evidence taken under the bankruptcy had been taken *ex parte* in a private room behind his back, and without any opportunity being given him to explain, and that the order had been made without any sufficient evidence, and as he submitted contrary to law, and before any choice of assignees had taken place.

Daniel, Q.C., and Sargood, for the appellant—

1st. From the 159th section, it appears that the powers given to the Court by the 222nd and 223rd sections were not intended to be exercised until the hearing of the application for an order of discharge.

2nd. At all events, a prosecution ought not to be directed without giving the bankrupt an opportunity to explain his conduct, as the order of the Court must necessarily act prejudicially to him on the trial.

Bacon, Q.C., and De Gex, for the respondents, were not called upon.

THE LORD CHANCELLOR said, that he could not interfere with the order of the Commissioner. The subject was important, but all the proceedings had been in accordance with the dictates of English justice. He was pressed to stop the granting of any such order, unless the bankrupt had been first examined, but he should be sorry to introduce any such rule.

There were two classes of provisions in the Bankruptcy Act with respect to offences under it; those contained in the 159th, and those contained in the 222nd and 223rd sections. It was only when the Court acted under the 159th section, that is, on an application for an order of discharge, that it could direct a prosecution before itself. But some of the misdemeanors specified in the 221st section, might occur before or immediately after the adjudication, and it might be necessary to take proceedings immediately, and before the creditors' assignee was appointed. In such a case it might be material for the Court to determine who should have the charge of the proceedings. If the Court thought that there was probable ground for believing that the bankrupt had been guilty of a misdemeanor under the Act, it was its duty to commit the prosecution to some one. It was said, that, in many cases, the bankrupt would be able, if he were allowed, to explain circumstances apparently suspicious. The Commissioners must have the credit of dealing with sufficient discretion to allow of explanations where it seemed probable that they could be afforded. But it was not the right of the bankrupt to be examined, nor was it the duty of the Commissioner to call upon him to be so. If that were the case, it would make our criminal procedure more like to that adopted in a neighbouring country than any one would wish to see it. It was urged that, before a police magistrate, the bankrupt would have had an opportunity of disclosing his defence; and thus be better off than he was at present. But it must be considered, that a Commissioner would not close the bankrupt's mouth as of course. Having under the 222nd section the powers of a Justice of the Peace, he would no doubt act as a Justice of the Peace would act in a similar case. It must be left to the discretion of the Commissioner, whether, where the bankrupt consented, inquiries should be directed or not; but it would be deplorable, if where an immediate power of indicting was required, delay could be occasioned by the bankrupt being entitled to demand an investigation. Besides, it might prejudice the bankrupt if he were brought up to be examined, and forced either to answer or to refuse to answer.

Then again, it was said, that the fact of the prosecution being directed by the Court, and a prosecutor appointed, would operate against the prisoner. But the Judge who presided at the trial, would, if necessary, charge the jury not to let this fact have any weight on their judgment. The law in entrusting the conduct of the prosecution to a responsible person,

meant to act in conformity with the rules of English justice, which the Court would depart from by acceding to the application.

His Lordship was at first struck by the language of the order, referring to "one or more of the offences, set forth in the 221st section." But, on consideration, he thought, that this was really the best form, as it would prejudice the bankrupt less than a more particular description. The application would be dismissed.

Lords Justices. } MICKLETHWAIT v.
15 DEC. 1864. } WINSTANLEY.

*Practice—Liberty to Prove in another Suit—
Evidence—Parties—Breach of Trust—Con-
tribution.*

An order made in one suit giving liberty to prove in another suit for an amount to be certified by the Chief Clerk, and a certificate made in pursuance of such order, are not alone sufficient to establish the debt in the other suit.

Per TURNER, L.J.—When a fund has been brought into Court in an administration suit, the next of kin are properly represented after decree by the personal representative until the fund has been distributed.

Per TURNER, L.J.—When a decree has been made against an executor, and the estate of a deceased executor, to make good a breach of trust, payment by the surviving executor of the whole amount due is a complete discharge of the deceased executor's estate, and it is not competent for the Court to enforce payment against the deceased executor's estate in order to establish contribution.

John Micklethwait, by his will, dated in 1837, after devising his real estates as therein mentioned, gave all the residue of his personal estate after payment of his debts, &c., to Thomas Micklethwait and William Micklethwait upon trust for conversion and investment, and to pay the dividends to his two sisters and the survivor of them during their or her life, and he gave a power of appointment of the capital to the survivor.

The testator died in 1838. William Micklethwait died in 1851 intestate, and letters of administration of his estate and effects were granted to his widow Elizabeth, who afterwards intermarried with Calvin Winstanley.

In 1851, the suit of *Micklethwait v. Micklethwait*, afterwards *Micklethwait v. Winstanley*, was instituted, before Stuart, V.-C., by the next of kin of William Micklethwait, against the administratrix, for the administration of the intestate's estate. The decree was dated the 30th of June, 1852; but considerable delay ensued, and the Master's report was not made until the 20th of July, 1855.

Mary Micklethwait, the surviving sister of the tes-

tator John Micklethwait, died in 1856. By her will she appointed John Birks her sole executor and residuary legatee: who, in January, 1859, instituted the suit of *Birks v. Micklethwait* before the Master of the Rolls, for the administration of John Micklethwait's personal estate; and by an order, dated the 18th of November, 1863, made on further consideration in that suit, it was ordered that Thomas Micklethwait should pay into Court, in respect of the balance jointly due from him and William Micklethwait, deceased, to the estate of John Micklethwait, the sum of 1667*l.*, and such further sum as should be found due for interest; and that the plaintiff, William Birks, the representative of John Birks, should be at liberty to prove under the decree in the suit of *Micklethwait v. Winstanley*, as a creditor upon the estate of William Micklethwait, deceased, for the sum of 1780*l.*, and for the sum which should be certified by the Chief Clerk to be due from the estate of William Micklethwait for interest, and should pay any moneys received by him in respect of such proof to the credit of the suit of *Birks v. Micklethwait* to the "account of moneys received from William Micklethwait's estate."

The above two sums of 1667*l.* and 1780*l.*, were the balances for which the executors were respectively liable on the joint account, *minus* interest.

The case is reported, on motion to vary the minutes of the above-mentioned order, 33 L. J. Ch. 510.

On the 15th of April following, Thomas Micklethwait paid into Court the sum of 1667*l.*

The Chief Clerk of the Master of the Rolls, by his certificate, dated the 11th of May, 1864, certified that the whole amount due from the estate of William Micklethwait, for principal and interest on the joint account, was 3698*l.*; and by an order made on the 9th of June following, by Vice-Chancellor Stuart, at Chambers, in the suit of *Micklethwait v. Winstanley*, William Birks was admitted a creditor for that amount, with liberty to attend further proceedings in the cause.

On the 16th of August, 1864, Thomas Micklethwait paid into Court a further sum of 1000*l.*, and on the 18th of November he paid in the balance of the amount still due from the executors to John Micklethwait's estate.

On the 2nd of December, Vice-Chancellor Stuart refused, with costs, a motion to discharge or vary the order of the 9th of June, and, from the order then made, and the previous order of the 9th of June, the present appeal motion was brought.

Jessel, for the appellants, the next of kin of William Micklethwait (some of whom were infants), contended—

1st. Under the old practice a creditor, after the Master had made his report, could not be admitted to prove a debt on summons, but must present a petition.

2nd. There was no evidence of any debt being due. The order was made by the Vice-Chancellor on the production of the Master of the Rolls' decree, giving liberty to prove, and his Chief Clerk's certificate

stating the amount. There was no declaration by the Judge of the amount due, nor any affidavit made by Birks, and the order was made and the accounts taken in the absence of the next of kin of the testator, for the personal representative did not represent the next of kin after decree. After decree the personal representative could not admit a debt, nor would any order bind the personal estate, except an order made in the administration suit. He referred to

Gillespie v. Alexander, 3 Russ. 130 ;

Greig v. Somerville, 1 Russ. & My. 388 ;

Seale v. Buller, 2 Gif. 312 ;

3rd. At the time when the order on the motion of the 2nd of December was made, nothing was in fact due, Thomas Micklethwait having paid the whole debt due from the executors jointly.

4th. The leave to a creditor at any time to attend future proceedings was irregular ; or at any rate, such creditor ought to pay his costs.

Freeling and *C. Hall*, for Birks, admitted that if there had been no previous proceedings, liberty to prove must have been applied for by petition ; but in the present case, the liberty to prove was given in a suit in a court of co-ordinate jurisdiction, in which all the parties were represented.

2nd. There was no case in which residuary legatees had been brought before the Court, while the fund was still *in medio* ; until the fund had been distributed they were represented by the executor as well after as before decree.

Gillespie v. Alexander (*loc. cit.*), was different from the present case ; there the application was to recall funds which had been paid out of Court, and, moreover, the debt had not been, as here, established in another suit. In the present case the question having been decided in a court of co-ordinate jurisdiction, it could not have been necessary to proceed *de novo* before the Vice-Chancellor.

3rd. It was true that the whole sum due from both executors had been paid by Thomas Micklethwait, but the Master of the Rolls had proceeded on the following principle.—He desired that Birks should prove against the estate of William Micklethwait, and bring the money into Court, irrespectively of payments by Thomas Micklethwait, in order that he might arrange contribution between Thomas Micklethwait and the estate of William Micklethwait. Birks' debt was not a legal one, which would be satisfied by payment, but an equitable debt arising from a breach of trust ; and, therefore, Birks would be a trustee only of the sum recovered from the estate of William Micklethwait, until the contribution had been arranged,

Lockhart v. Reilly, 1 De G. & J. 464 ;

Priestman v. Tindall, 24 Beav. 244.

4th. The only costs in question were the costs of the summons to admit the proof ; they should have been asked for before the Vice-Chancellor.

Jessel, in reply, said that in the cases cited there was either further consideration reserved, or an actual decree for contribution ; in fact, *Lockhart v. Reilly* (*loc. cit.*) showed the course which ought to have been followed in the present case.

Whatever the nature of the debt due to Birks might have been, when that debt was once paid he could have no *locus standi* in the suit of *Micklethwait v. Winstanley*.

KNIGHT BRUCE, L.J., said, that there might be a time when, and a manner in which, the object sought by Mr. *Freeling* and Mr. *Hall* might become obtainable, but on the evidence before the Court, and having regard to what he understood to be the rules of the Court, he did not think that it was then obtainable. With deference to the Vice-Chancellor, he thought that the two orders appealed from were not consistent with the rules of the Court, and that the departure from those rules was not consistent with substantial justice.

TURNER, L.J., said, that their Lordships were bound to assume that the decree of the Master of the Rolls was right, as no question as to that decree was before them, but he thought that his Honour's attempt to arrive at contribution by a short cut was neither very expedient, nor safe. The present case illustrated this ; but the decree must be assumed to be right. He did not agree with Mr. *Jessel* to the extent of saying, that the persons interested in the personal estate of William Micklethwait were not bound by the decree of the Master of the Rolls as to that personal estate. The estate had not been distributed, and he thought a suit with regard to it might be properly brought against the surviving executor and the personal representative of the deceased executor, and that a decree in the suit would bind the parties interested. It was a question of some importance, and he was not satisfied that the parties beneficially interested would not be bound.

The decree of the Master of the Rolls gave liberty to prove only. Liberty to prove was for a certain sum to be afterwards ascertained. It might be difficult to say, that liberty to prove would not have given a right to carry in a proof, but he did not see how the Court in one suit could give liberty to prove in another suit without a declaration of the amount to be proved for. But, in the present case, before an application had been made to prove, a great portion of the debt had been actually paid, and he did not think that a mere direction or liberty to prove in one cause could do away with the effect of payment in discharging the debt before application had been made to prove for it in another cause.

The effect of the Master of the Rolls' decree was, to suspend payment until the rights of contribution between the parties liable to pay that debt had been settled. But the debt had been actually paid. Considering the circumstances under which the application

had been made by Mr. Birks, he thought that there should be no costs of the appeal motion.

Minute.—Discharge both orders of the Vice-Chancellor appealed from, without prejudice to any question. The costs of the plaintiffs and defendants in the suit of *Micklethwait v. Winstanley*, of the summons, and two motions, to be costs in the cause.

Lords Justices. }
25, 27, 28 JUNE, } *BROOKE v. LORD MOSTYN.*
21 Nov. 20 DEC. 1864. }

*Infant—Compromise approved by Court—
Fraud.*

The expediency of a compromise between the owners of an estate, and other parties, one of whom was an infant, depended on the value of the estate. The information and evidence as to the value upon which the other parties consented to, and the Court of Chancery sanctioned the compromise, was all furnished by the owners. The owners had at the time in their possession other more detailed information; which would probably have put the Court upon inquiry, and led to its discovering that the value had been underestimated:—

Held, that this was a sufficient ground for setting aside the compromise at the suit of the infant.

Per TURNER, L.J.—A compromise sanctioned by the Court of Chancery on behalf of an infant, cannot be set aside on grounds less strong than those which would be required to set aside a compromise between adults.

This was an appeal, by the plaintiff, against a decree of the Master of the Rolls, dismissing his bill.

The object of the bill was to set aside, as against the plaintiff, a compromise which had been effected on his behalf, when an infant, with the sanction of the Court of Chancery, in reference to a legacy of 20,000*l.*, bequeathed to his mother by Sir Thomas Mostyn.

The hearing before the Master of the Rolls, was reported 4 N. R. 41, where the facts of the case are stated at considerable length.

For the present report, the following facts require to be stated in addition to those given in the former report—

In addition to keeping down the interest on the legacies bequeathed by Sir Thomas Mostyn's will, the second Lord Mostyn had made advances to Gryffydd Lloyd and Richard Parry, in respect of the principal of their legacies.

Previously to Mary Bridget Mostyn releasing her legacy, the second Lord Mostyn executed a deed of covenant to pay, or secure to her on her marriage, 10,000*l.*, with interest at 5*l.* per cent. in the meantime, subject to a proviso that this sum should not be called in during her lifetime.

Richard Parry had died in 1834, largely indebted to Sir Thomas Mostyn's estate; and some years after 1842, his executors paid upwards of 8000*l.* to that estate, on account of that debt.

Upon the compromise being first proposed to Captain Brooke, he desired to consult Messrs. Jones, Bateman, and Bennett, who had been the solicitors of the testator, and afterwards of the second Lord Mostyn; but Lord Mostyn objected to their being consulted, on the ground of differences which had arisen between himself and them.

The first Lord Mostyn's affidavit before the Master, stated that Gryffydd Lloyd, Mary Bridget Mostyn, and Richard Parry's executors, had released the estate from their legacies, without mentioning the deed of covenant given to Mary Bridget Mostyn.

Sisson in his valuations, did not take into account considerable portions of the estate which were in hand.

Subsequent to the compromise, the first Lord Mostyn presented two further memorials to the Commissioners of Stamps and Taxes, stating that no legacy, and no interest upon any legacy, had been paid by any of the testator's executors. The Commissioners still for some time refused to repay the legacy duty, but ultimately they repaid it upon another memorial, presented after some of the estates had been sold.

In a suit of *Mostyn v. Mostyn*, instituted for the purpose of carrying out the trusts of the Mostyn Act, a report was made, after the earlier sales, by the Master, as to the value of the term of years; which report agreed substantially with the representations made at the time of the compromise.

Selwyn, Q.C., Freeling, and Cutler, for the plaintiff. The Court will set aside an order fraudulently obtained,

Brydges v. Brantill, 12 Sim. 369.

In this case the sanction of the Court to the compromise was obtained by misrepresentations by or on behalf of the second Lord Mostyn,

1st. As to the value of the estates charged with the legacy;—Sisson's valuation, upon which the estimate laid before the Master was based, having been improperly made, inasmuch as it took no account of the property in hand, and also allowed very large deductions for expenditure in plantation and other improvements, and the subsequent sales having proved that the estates were greatly undervalued.

2nd. As to the other legacies having been released without consideration; Mary Bridget Mostyn having had a covenant from the second Lord Mostyn and Richard Parry's estate having been considerably indebted to the testator's estate.

3rd. As to the non-payment of the other legacies; the second Lord Mostyn having made payments both to Parry and to Gryffydd Lloyd.

The second Lord Mostyn must have known the falsehood of the above representations, but whether that be so or not, actual misrepresentation whether wilful or not, is sufficient to invalidate the compromise,

1 Story, Equity Jur. sect. 193;

Rawlins v. Wickham, 3 De G. & J. 304.

Those defendants, who claim through Thomas

Mostyn, cannot derive benefit from the misrepresentations of the second Lord Mostyn,

Scholefield v. Templer, John. 155.

The plaintiff's counsel also relied upon the misrepresentations contained in the memorials to the Commissioners of Stamps and Taxes, and on the second Lord Mostyn having objected to the plaintiff's father consulting the solicitors of the testator as to the compromise, and insisted that, by reason of the sale of the property comprised in the term of 500 years, the legacy had become a charge upon the fee simple.

Baggallay, Q.C., and *Jones Bateman*, for the second Lord Mostyn, and *Sir H. Cairns, Q.C.*, and *Speed*, for the devisees of Thomas Mostyn.

This was such a compromise as the Court had jurisdiction to make on behalf of an infant,

Morison v. Morison, 4 My. & Cr. 215, 225 ;

Gregory v. Molesworth, 3 Atk. 626 ;

Earl of Buckinghamshire v. Drury, 2 Eden, 60 ;

Bennett v. Merriman, 6 Beav. 360 ;

Drake v. Fortune, 1 Moll. 201 ;

Chetwynd v. Fleetwood, 1 Bro. P. C. 300 (8vo. ed.) ;

Ashburton v. Ashburton, 6 Ves. 6 ;

Inwood v. Thorne, Amb. 417.

The evidence taken before the Master as to the value of the estates was true in fact, Sisson's estimate being based on a higher rental than could have been reasonably expected to be maintained ; and as the subsequent sales were made at an unusually favourable time, they were no criterion of the value at the time of the compromise. Moreover, the fee simple was sold and the legacies were only charged on the term, the Mostyn Act having given the legatees no additional rights. The report in *Mostyn v. Mostyn* showed what the value of the term really was.

The memorials to the Commissioners were not before the Master, and had no bearing on the compromise ; neither the covenant given to Mary B. Mostyn, nor the payments in respect of legacies made by the second Lord Mostyn, were material facts, the suppression of which could affect the compromise ; the debt from Richard Parry's estate had not been released but was afterwards recovered. Lord Mostyn's objection to the employment of Messrs. Jones, Bateman, and Bennett arose from differences between him and them, and not from a desire to withhold information from Mr. and Mrs. Brooke and their trustees. The second Lord Mostyn was no gainer by the compromise ; he was only tenant for life of the estates charged with the legacy, and by the compromise he made himself personally liable for the whole amount.

Even if the value of the property had been understated, that was not a sufficient ground for setting aside a compromise, in the absence of intentional misrepresentation ; value being a matter of opinion, upon

which the persons acting for the plaintiff had means of forming an independent judgment,

1 Story. Eq. Jur. sects. 191, 197 ;

Clapham v. Skillo, 7 Beav. 146, 149.

Thomas Mostyn was, as to the second Lord Mostyn's life interest, a purchaser for value without notice, and his devisees could avail themselves of this defence, although the legal estate was outstanding,

Greenwood v. Churchill, 6 Beav. 314 ;

Joyce v. De Moleyns, 2 Jo. & Lat. 374.

The proper mode of impeaching the order approving the compromise, would be by a petition of rehearing or a bill of review.

The bill contains unfounded charges of fraud, and, therefore, ought to be dismissed with costs,

Wilde v. Gibson, 1 H. of L. Ca. 605 ;

Wright v. Howard, 1 Sim. & St. 190.

Schoyn, Q.C., in reply.

TURNER, L.J., said, that it could not be disputed that the Court had power to compromise the rights and claims of infants, and persons under disabilities, where those rights and claims were merely equitable. That power had been continually exercised by the Court, and resulted almost necessarily from the jurisdiction which the Court exercised over trustees. In the exercise of that jurisdiction, the Court might, in general, order trustees to deal with the trust property in whatever mode it might consider to be for the benefit of *cestuis-que-trustent* who were infants, or under disabilities ; and to say that *cestuis-que-trustent* can, except under very special circumstances, undo what the Court has ordered to be done, would be to cut away the root of the jurisdiction. He had thought it right to make these observations, because he considered it of great importance, that no doubt should be cast upon the power of the Court, or upon the validity of acts done in the fair and *bona fide* exercise of its powers. The rights of infants and incapacitated persons must, in many cases, be sacrificed, if this jurisdiction were not maintained, nor could acts done under it be set aside without thereby affecting property to a great amount. Moreover, such compromises as these were made by the Court in the exercise of its discretion, and the Court was not in the habit of disturbing what it had done in the exercise of its discretion, except upon very strong grounds.

What circumstances, then, would furnish sufficient ground for impeaching a compromise made under the order of the Court ? He thought that they must be such as to amount to fraud in the party claiming the benefit of the compromise ; meaning by fraud, not moral fraud, but what in the eye of the Court was considered as amounting to fraud. A compromise between adult parties could not be set aside on any other grounds ; if there were no fraud, and equal knowledge on both sides, the compromise must not be disturbed, but if there were knowledge on one side which was withheld from the other, the compromise could not

stand, because the withholding of the knowledge amounted, in the view of a Court of Equity, to fraud. The rule which applied between adults, seemed to him to be not less applicable to compromises by the Court on behalf of infants. The orders of the Court could not be set aside on grounds less strong than those which would be required to set aside a transaction between competent parties. Whether the grounds which would be sufficient to set aside a compromise between competent parties, would, in all cases, be sufficient to set it aside when sanctioned by this Court, it was unnecessary in the present case to determine.

There could be no doubt, that a decree or order might be impeached for fraud by original bill. He, therefore, passed by the argument, that a bill of review was necessary to set aside the order: it was sufficient to say, that, in his opinion, the plaintiff, in order to entitle himself to relief in this suit, must make out a case of fraud; and upon this principle he rested his judgment.

With regard to the alleged misrepresentations made to the Commissioners of Stamps and Taxes, the Commissioners had only to consider whether there had been assets of the testator for the payment of the legacies, and he did not consider it a fraud upon them not to have communicated to them the fact that payments had been made to the legatees by the present Lord Mostyn otherwise than on account of the estates; but, even assuming that a deception had been practised on the Commissioners, it would be going too far to hold, that the compromise with the plaintiff could be affected by that deception. The non-employment of Messrs. Jones, Bateman, and Bennett was, in his opinion, sufficiently accounted for; and he did not think that the circumstance of the Cors-y-Gedol and Plas-Hen estates having been ultimately sold for sums so far exceeding their estimated values had any bearing upon the case, except so far as it cast a suspicion upon the *bona fides* of the estimate, and rendered it incumbent upon the Court very carefully to examine the data upon which it was based. If the compromise was fairly and honestly entered into at the time, its validity could not be affected by what subsequently occurred.

Was, then, this compromise fairly and honestly made at the time? If it was, the plaintiff must be bound by it; if it was not, he must be entitled to be relieved against it, and to have it ascertained, by proper accounts and inquiries, whether there were, or were not, assets for the payment of the legacy in which he was interested. Except the compromise, there was nothing to debar him from such accounts and inquiries, for, assuming that, in the suit in which the accounts had been taken, the trustees could properly represent their *cestuis-que-trustent*, the plaintiff had ceased to be a *cestui-que-trust* before any material proceedings were taken in that suit.

The question, whether this compromise was fairly and honestly made at the time, depended upon whether, in laying the facts before the Master, and

through the Master before the Court, all that was material to be stated, and was within the knowledge of the parties, was fairly and honestly stated; for he desired distinctly to be understood as not intending to proceed on any error in judgment, either on the part of the Master, or on the part of the Court. The bill alleged misrepresentations to the persons acting on behalf of the plaintiff, and to the Court itself, as to the value of the property liable to the payment of the debts and legacies, and as to the releases given by the other legatees. To the representations as to the releases, he attached but little importance, the considerations given for those releases having been, in effect, the same as that given for the release of the plaintiff's legacy.

The case, in his opinion, depended substantially upon this: were the representations which were made as to the value of the property liable to the payment of the debts and legacies (other than the personal estate, as to which there was no evidence of misrepresentation), viz., the estates comprised in the term, untrue, unfair, or dishonest?

It had been contended, on the part of the plaintiff, that in estimating the assets for the payment of the legacies, the value of the fee of these estates, and not of the 500 years' term only, ought to be taken into account; but, in his opinion, that was not the true construction of the Mostyn Act. The Act, no doubt, subjected the fee of these estates to the payment of the legacies, but only to the extent of the value of the term. It was not the purpose of the Act to extend or alter the rights of the legatees. The proceeds of the sale were to be applied to the payment of the debts and legacies, only so far as, according to the true construction of the will, they ought to be paid; and the proceeds were to be distributed under the order of the Court, which must, of course, be governed by the provisions of the will, in the absence of any contrary direction. It was to the value of the term, therefore, and not to that of the fee, that attention must be directed. Now, upon the evidence before the Master, upon the reference as to the compromise, nothing more appeared as to the value of the term, than that it had been estimated by competent persons to be of the value of 151,000*l.* at the highest; and that this, to the belief of Cynric Lloyd, was the utmost value—Lord Mostyn being silent as to his belief upon the subject. How the case might have stood if it had rested here, it was not necessary to say, for the Court had now before it the valuation of Sisson, which, no doubt, was the valuation to which the affidavits referred. From this document, which was of the utmost importance, it appeared, that the 151,000*l.* was arrived at, by first taking the nett rental, after deducting, not merely for ordinary repairs, but for improvements also, and then adding to the nett rental about 500*l.* a year for sums beyond ordinary repairs and out-goings, and taking twenty-two years' purchase on the aggregate sum.

Now this document must have been in the possession of the defendants when the case was before the Master; why was it not produced? It was impossible to say that if it had been produced he would have acted upon this valuation, that he would not have been led to inquire whether there were not other parts of these estates which were valuable for sale, though producing no rental, and whether the addition made to the rental, in respect of the expenditure upon improvements, was a fair and proper addition. What the result of such an inquiry might have been, the evidence in this suit showed; it was in proof that there were mansion-houses, with large quantities of land attached to them, which did not appear to have been let, and also that the expenditure upon the estates was enormous, never less than one-fourth, and, in some years, exceeding one-third of the gross annual rental; but it was sufficient to say, that this document showed that the materials necessary to enable a fair judgment to be formed upon the question, whether this compromise was for the benefit of the infant, was not fairly and properly brought under the Master's consideration; that there was a suppression of material facts which were within the knowledge of Lord Mostyn and his advisers, and were not within the knowledge of the plaintiff, or of those who acted for him. It might be said, perhaps, that the Master called for no further information, but this was immaterial; information had been withheld, which, if given, might have altered the conclusion arrived at; and the withholding of such information amounted, in the eye of this Court, to fraud. He thought that the advisers of the Mostyn family, perhaps from an over-zeal to carry out the object which it was intended to effect, had laid before the Master such materials only as were calculated to lead him to the conclusion they desired, and kept back from him the further materials which would have led him to further inquiry. It had been said, that the Act of Parliament had been before the Master, but the Master could hardly have acted upon it, for, as the Act subjected to the debts large estates which were not subject to them under the will, it was manifestly for the benefit of the creditors, whether the estates subjected by the will were sufficient or not; and as to the devisees, the question of the value of the estates was immaterial, the estates made liable by the Act being charged only to the extent to which the estates charged by the will were liable. It had been said also that evidence was given before the House of Lords in support of the bill on which the Act is founded; if so, why was it not produced before the Master? This, again, was a circumstance tending strongly to show that all the material facts were not brought before the Court. Under all the circumstances of the case, but more especially having regard to the non-production of Sisson's valuation, his Lordship's opinion was, that the compromise could not stand, and that the decree, therefore, could not be supported.

KNIGHT BRUCE, L.J., said, that it was plain that the report made in 1843, in favour of the arrangement in question, called a compromise, though made by an able Master, was founded on insufficient materials, and ought not to have been made; and, from the evidence before the Court, he was satisfied that if the evidence, which might and ought to have been laid before the Master, had been laid before him, it would have been right for him to report, and he would in all probability have reported, otherwise than he did. There were before the Master, on the occasion of the reference to him, parties whose duty it was to bring under his attention the material facts within their knowledge, and in the absence of these material facts the report was not properly or fairly obtained. The present plaintiff was entitled, on that ground, to be relieved against that report, although it had been confirmed, and against the deed of 1843. The Court, therefore, ought to make a decree setting aside the compromise. He did not mean to express any opinion upon the point, whether the plaintiff was, or was not, likely to derive any benefit under the decree.

20 DEC. 1864.

The cause having been, by the direction of the Court, placed in the paper of this day to be spoken to, a decree was now directed to be drawn up in accordance with the following minute—

Minute.—Declare that the arrangement carried into effect by the indenture of the 20th of March, 1843, and the deeds poll of the 14th and 15th of March, 1843 (the deeds carrying out the compromise), is not binding upon the plaintiff. Declare that the plaintiff is not bound by the order of the 17th of March, 1843, and that, notwithstanding the said order, the plaintiff shall be at liberty to prosecute the suit instituted by him, as in the said order mentioned, and to take such other proceedings as he may be advised for recovering the legacy of 20,000*l.* Reserve the costs of this suit, with liberty to apply.

Lords Justices.

3, 4, 5 Nov. 21 DEC. 1864. } REDE v. OAKES.

Vendor and Purchaser—Sale by Trustees and Others of Different Properties as One Estate, and for One Sum—Apportionment of Purchase-money—Deposit.

Where trustees, with power to sell by private contract, joined with others in selling as one estate, and for one sum of money, different properties which could not be clearly distinguished, and the titles to which were, by the conditions of sale, limited to different periods:—

Held (reversing the decision reported 32 Beav. 555), that the title was too doubtful to be forced upon a purchaser, as the trust property might have been injured by the joint sale, and that the Court could

not, under such circumstances, apportion the purchase-money.

The Court directed the trustees to return the deposit paid on the signing of the agreement for sale.

This was a suit for specific performance.

On the 8th of March, 1862, the defendant agreed to purchase from the plaintiffs, by private contract, certain lands and hereditaments for the sum of 16,650*l.*, according to printed particulars of sale (the hereditaments having previously been offered for sale by public auction), so far as such particulars were applicable to a sale by private contract.

By the sixth condition of sale the abstracts of title to the property, other than that part of which a Mrs. Rede was vendor, were to commence as follows, viz., as to the manors and freehold portion with indentures dated in 1803, 1805, 1807, 1813, and an indenture dated the 31st of December, 1845; as to the copyhold part with admissions dated in 1823, 1825, and 1828; and as to the leasehold portion with indentures dated in 1788 and 1797; and as to such parts of the manors and freeholds as were not comprised in any of the aforesaid indentures (other than the indenture of the 31st of December, 1845), the title was to commence with the will of Robert Rede, dated in 1821 and proved in 1822. As to Mrs. Rede's part of the property, the title was to commence with the will of her late husband Robert Rede Rede, dated in 1831 and proved in 1852, with a declaration of possessory title of more than fifteen years. The property other than that of which Mrs. Rede was vendor was vested, as to part, in the trustees of Mrs. Rede's marriage settlement, and, as to the remainder, in the trustees of the marriage settlements of her four daughters, to whom it had been devised as tenants in common by the will of their grandfather, Robert Rede.

It was stated by the vendors that Mrs. Rede's marriage-settlement contained a power of sale, but the settlement had not been produced to the defendant. The marriage-settlements of the daughters contained a trust for sale with the usual receipt clause.

On the 10th of March, 1862, the defendant paid the sum of 1,665*l.* by way of deposit, and signed an agreement to complete the sale on the 10th of October following.

By an agreement, dated the 8th of October, the vendors, plaintiffs in this suit, agreed that the sum of 140*l.* should be considered as the value of so much of the property as was marked with a blue line in the particulars of sale (and which, it was stated, was the property of Mrs. Rede in her own right), and should be received by her; that the sum of 352*l.* should be considered as the value of so much of the property as was marked with a red line (and which, it was stated, was comprised in Mrs. Rede's marriage-settlement), and should be received by the trustees of that settlement,

and that the sum of 16,158*l.* should be considered as the value of the residue of the property, and should be received by the several trustees of the marriage-settlements of Mrs. Rede's daughters, and be applied by them accordingly.

The three properties were intermixed, and their identity was not clearly proved.

Under the above circumstances the defendant declined to complete the purchase, on the ground that the trustees were not competent to enter into the agreement for the apportionment of the purchase-money, and that the several properties ought to have been sold separately.

The bill was filed by Mrs. Rede and the trustees of her marriage settlement, and her four daughters and their husbands and the trustees of their marriage settlements,—twenty-one persons in all.

The Master of the Rolls by his decree, dated the 29th of May, 1860, directed inquiries, whether a good title to the property could be made, and how the purchase-money ought to be apportioned, and his Honour's Chief Clerk having certified that a good title could be made, and that the purchase-money ought to be apportioned according to the agreement of the 8th of October, the defendant took out a summons to vary the certificate. The summons was adjourned into Court, and the Master of the Rolls by an order, dated the 30th of May, 1864, made on the hearing of the adjourned summons, and of the cause on further consideration, ordered that the agreement of the 8th of March, 1864, should be specifically performed.

The case is reported in the Court below (32 Beav. 555).

The defendant now appealed from the decree and order made by the Master of the Rolls.

Selwyn, Q.C., and *J. T. Humphrey*, for the appellant, contended—

1st. The original contract was a vicious one, involving a breach of trust, and therefore the Court would not enforce it,

Mortlock v. Buller, 10 Ves. 292;

Thompson v. Blackstone, 6 Beav. 470.

There was nothing on the face of the contract which showed how much of the property was held with only a seventeen years' title under the deed of 1845: the trust property might have been held with a sixty years' title, and Mrs. Rede's property with a seventeen years' title only, and in that case the trust property would be depreciated by being sold mixed up with Mrs. Rede's property; the same thing would occur if the trust property consisted of better land than Mrs. Rede's property.

It was true that the sixth condition of sale gave notice that the vendors held under different titles, but as the property was sold in ten lots, of which the defendants had only purchased two, it was quite consistent with the contract, that Mrs. Rede and her trustees should have nothing to do with those two

lots, and the purchaser had assumed that the trustees were not committing a breach of trust by selling to him as they had done.

To affirm the decision would be to overrule Sir L. Shadwell's distinct opinion in

Clark v. Seymour, 7 Sim. 67;

and to compel purchaser to take upon himself the risk of deciding a difficult question of apportionment, contrary to the doctrine of

Pyrke v. Waddingham, 10 Hare, 1.

Baggallay, Q.C., and *F. J. Turner*, for the plaintiffs, said, that the reference to Chambers had determined the value of the different parts of the property. If each set of trustees could sell by private contract the particular portion of the property vested in them, and fix the amount of the purchase-money, it must also have been competent for the various sets of trustees to combine to sell the whole of the property, and fix the aggregate amount of the purchase-money.

As to the suggestion that the value of the trust property might have been diminished by its having been sold with the other property, no proof whatever had been adduced that such was the case.

J. T. Humphry, in reply: It was admitted, that if the trust property were damaged by being sold with other property, the Court would not enforce the contract; but why should the onus of deciding whether there were damage or not be thrown upon the purchaser?

Malins, Q.C., as *amicus curiæ*, in answer to a question from their Lordships, expressed his opinion that as it was competent for each set of trustees to fix the price of the portion of the property vested in them, it was also competent for them to fix the aggregate price of the whole property, and divide the purchase-money.

21 DEC. 1864.

KNIGHT BRUCE, L.J., said, that at the hearing he had been in favour of the plaintiffs, but the nature of the case was such, that it was no wonder that he had changed the opinion which he then entertained. He thought on consideration, that the bill ought to be dismissed, for he could not satisfy himself that the contract was not a breach of trust on the part of each set of trustees. The agreement of the 8th of March, 1862, was a mistake; the vendors, as vendors, were represented as a single body, and the price of the portion of the property vested in each set of trustees, was liable to be affected by considerations with which properly that set of trustees had no concern. The trust property held by each set of trustees ought not to have been made liable to any defect of title in any other part of the property.

The doctrines and principles applicable to specific performance were opposed to granting it in the present instance, for it was not clear that a breach of trust had not been committed, and if there was a reasonable doubt, the Court would not decree specific performance.

TURNER, L.J., said, that the case presented two points for consideration,—whether specific performance of the agreement ought to be decreed, and if so, whether the order of the Master of the Rolls was right. The argument had been carried to a great length. It had been said, that trustees for sale ought in no case to join with other persons in selling the trust property, but it would be very detrimental to trust property if such a general rule were laid down. He could not agree that a trust property could not be sold with another property as one estate, but when such an estate was sold, the trust property must not be injured. The true question was, whether the sale had been so made that the *cestuis-que-trustent* could be held bound; if not, the title of the purchaser was not unimpeachable. In that point of view, looking at the situation of the different parts of the estate, he had no doubt that the whole estate could have been beneficially sold together. The difficulty lay in the manner of carrying out the sale. For, first, the terms of the contract did not afford the means of apportionment of the purchase-money on a fair and reasonable basis; and, secondly, the question arose, whether the trust property was injured by being joined with the other property. Looking at the sixth condition of sale, it would be necessary to determine the value of different portions of the property held on titles of different lengths. The plaintiffs had arrived at a solution of the difficulty, but it was not one which could be adopted by the Court; and in a case of this description, the Court ought to apportion the purchase-money. There was the further difficulty, that the sale had been so made that the bulk of the trust property might have been injured. The conditions of sale did not state the amount of property held under each title. The purchaser of the property might have imagined that he was to have only a seventeen years' title to a large portion of the property. He would go no further than saying, that it was doubtful whether the *cestuis-que-trustent* were bound by the sale; and if it was doubtful, that was sufficient ground for refusing specific performance.

Their Lordships dismissed the bill, but, having regard to the novelty of the question, and the fact that the decree might have been appealed from in the first instance,—without costs; and, after consultation with the Registrar, directed the deposit paid by the purchaser to the vendors to be returned to him as well as his appeal deposit.

Lords Justices. } *JOHNSON v. HELLERLEY.*
21 DEC. 1864.

Partnership—Sale of Goodwill—Form of Advertisement.

In a suit for winding-up a partnership, the partnership property was ordered to be sold as a going concern:—

Held, that the particulars of sale should show that

the surviving partner was not prevented from carrying on the same business.

This was a suit for winding up a partnership, in which the Master of the Rolls had held, that the surviving partner was entitled to have it stated in the advertisement and particulars of sale, that his right to set up a similar business in the same town was reserved; see, *ante*, 5 N. R. 4.

The arguments of counsel were similar to those in the Court below.

Hobhouse, Q.C., and Waller, for the defendant, cited,

Hall v. Barrows, 1 N. R. 543; 5 N. R. 259;
Cook v. Collingridge, Jac. 607; 27 Beav. 456;
Collyer on Partnership, p. 178.

Baggallay, Q.C., and C. Hall, for the plaintiff, cited,

Churton v. Douglas, John. 174.

TURNER, L.J., said, that having regard to the authority of *Cook v. Collingridge* (*loc. cit.*), he thought that the particulars and conditions of sale ought to specify what was meant by the goodwill of the business; and that the advertisement should, after mentioning the premises sold, and the goodwill, contain a clause to the following effect:—"This sale will give to the purchaser, both the premises in which the business has been carried on, and the benefit derived from the habit of the customers resorting to such premises; but will not prevent any person heretofore interested in the business from carrying on the same business."

KNIGHT BRUCE, L.J., concurred.

Lords Justices,
AND
Master of the Rolls. } BLOXAM v. CHICHESTER.
21 DEC. 1864.

Practice—Written Answer—Gen. Ord. March 6, 1860, r. 3.

Where a defendant filed a written answer, but did not afterwards print it:—

Held, that the proper course for the plaintiff was to move to take the bill pro confesso.

In this suit the defendant had been attached for want of an answer. He then filed a written answer, and having obtained a certificate that he had done so from the Clerk of Records and Writs, he obtained his discharge from custody on the same day. He had not within four days afterwards left a printed copy of this answer with the Clerks of Records and Writs. The plaintiff wished to accept the answer, and to give notice of motion for a decree, but the Record and Writs' Clerk refused to give a certificate that the cause was ready to be heard. The ground of the refusal

was, that the written answer had become a nullity after the expiration of the four days allowed for printing the answer. The General Order of the 6th of March, 1860, rule 3, directs that the defendant shall within four days from the filing of his written answer leave a printed copy thereof with the Clerks of Records and Writs, "and if such printed copy shall not be so left, the defendant shall be subject to the same liabilities as if no answer had been filed."

Babington now moved that the Records and Writs' Clerk might be directed to give his certificate that the cause was ready to be heard.

THE MASTER OF THE ROLLS said, that he could not give such a direction. The words of the Order showed that the answer had become a nullity, and that the defendant was in the same position as if the written answer had never been filed. The plaintiff might again move to attach him, which might lead to the same difficulty over again. His Honour thought that the proper course would be for the plaintiff to move to take the bill *pro confesso*.

Babington then mentioned the case to the Lords Justices, and moved them to direct the Records and Writs' Clerk to give the required certificate.

The LORDS JUSTICES refused the application, on the ground that there was no answer on the file; and said that the plaintiff must again attach the defendant.

Master of the Rolls. } *Re THE PATENT ARTIFICIAL*
10, 17 DEC. 1864. } *STONE COMPANY (Limited).*

Winding up—Limited Company—Paid-up Share.

A holder of paid-up shares in a limited company presented a petition to have the company wound up:—

Held, that the petitioner had not such an interest as to induce the Court, on his petition, in the absence of other circumstances, to order the company to be wound up.

Semble, neither will the Court, on such a petition, direct a meeting of the company to be held to take the sense of the shareholders.

This was a petition by a shareholder to wind up the above-mentioned company.

The company had been formed, in 1862, to work a patent, dated 18th June, 1862, for the improvement of the manufacture of artificial stone. The nominal capital was 20,000*l.*, divided into 2000 shares of 10*l.* each. Of these 1,500 paid-up shares were allotted to the patentee as the purchase-money for the patent. Of the remaining 500 only 110 had been allotted. The greater part of the capital which had been paid up had been expended in purchasing a wharf and plant and fixtures for carrying on the business. The directors had advanced money for carrying on the business. The

receipts had been small, and the balance at the bankers' was 25*l*. A creditor had obtained a judgment for 240*l*., but had not issued execution, and he and the other creditors were content to wait for payment. The petitioner held five shares fully paid up.

Selwyn, Q. C., and *De Gez*, for the petitioner.

Locock Webb, contra.—The debts have been incurred in setting the business on foot. As the petitioner's shares are fully paid up, he cannot incur any liability by the continuance of the company, and has not, therefore, any such interest as entitles him to present this petition.

Selwyn, Q. C., in reply.—If the company is wound up now, there may be a surplus, and the petitioner may then receive back some of his capital.

17 DEC. 1864.

THE MASTER OF THE ROLLS said, that in his opinion, a sufficient case had not been made out for winding up this company. The petitioner personally had not such an interest as entitled him to ask to have the company wound up: for all his shares were fully paid up, and the company was limited, so that he could incur no further liability by the continuance of the company. It had been argued that if the assets on being realised produced a surplus, he would recover part of what he had paid on his shares. But that was too remote a possibility to be considered in a case like the present, and it did not constitute an interest in the company sufficient to induce the Court to attend to the petitioner's request to wind up the company, unless, indeed, there were other circumstances which would make it proper to do so. There were no such circumstances in the present case. It had not yet been fairly tried whether the company could or could not effect the objects proposed. The creditors did not press the company, and the principal shareholders desired it to go on. The petition must, therefore, be dismissed with costs.

Note.—See and compare,

East Pant Du United Lead Mining Company v.

Merryweather, 4 N. R. 541; 5 N. R. 166;

Re Factice Parisien (Limited), ante, p. 178.

Master of the Rolls. } ANTHONY v. COWPER.
21 DEC. 1864.

Practice—Taking a Bill pro confesso—Cons.
Ord. X. r. 6.

A bill may be taken pro confesso against an absconding defendant, notwithstanding the interrogatories have not been delivered, and the filing of them has not been advertised.

Anon. 4 Jur. (N. S.) 583, not followed.

The defendant William Cowper, having been proved to have absconded to avoid service of process, an order

was made under Cons. Ord. X. r. 6, that he should appear before the 9th day of April, 1864, and this order was inserted in the "London Gazette," and duly published.

No appearance having been entered, the Court, on the 14th day of April, 1864, gave leave to the plaintiff to enter an appearance for the defendant, which was accordingly done.

Interrogatories were filed in due time, but could not be served upon the defendant, as it was not known where he was.

Notice of motion to take the bill *pro confesso* was inserted in the "London Gazette," as required by Cons. Ord. XXII. r. 4, and, on the 14th day of July, 1864, the plaintiff, under the above rule, obtained an order to take the bill *pro confesso* against the defendant.

This order the Registrar declined to pass, for the following reasons, viz.—

The defendant was not shown to be in default for want of an answer; in fact, he was not in default, never having been served with the interrogatories. Cons. Ord. XXII. r. 2, provided that, when a defendant did not "put in his answer in due time after appearance," &c., "he should be deemed to have absconded." There could be no "due time" to answer till after service of the interrogatories. The case of *Buttler v. Mathews* (19 Beav. 549), might seem to be in point, but there the defendant was clearly not in default,—a fact which seemed to have been overlooked, the attention of the Court being directed only to the question of issuing an attachment. In the cases there cited the defendant had no doubt been served with a subpoena to appear and answer under the old practice, and was in default. The difficulty occurring in the present case had been provided for in *Anon.* (4 Jur. (N. S.) 583), by directing the interrogatories to be advertised, and that case had, as he, the Registrar, understood, been subsequently followed.

Speed, for the plaintiff, asked that the order to take the bill *pro confesso* might be passed.

The General Orders did not require the interrogatories to be advertised; and throughout the suit the defendant must be deemed to be absconding. He cited,

Wilkins v. Hogg, 30 L. J. Ch. 492;

Buttler v. Mathews, loc. cit.;

Anon. loc. cit.

THE MASTER OF THE ROLLS said, that he did not understand why the interrogatories should be advertised; he was of opinion that the order he had made was correct, and he would direct it to be passed.

Kindersley, V.-C. } **BRANDON v. BRANDON.**
18 TO 25 NOV. 20 DEC. 1864. }

Jurisdiction—Lands Clauses Consolidation Act, 1845, s. 76—Costs.

Semble, where money has been paid into Court under the 76th section of the Lands Clauses Consolidation Act, representing the value of an interest greater than that which can be substantiated by the claimants, the Court will determine how much of the fund represents the excess of interest by reference to Chambers.

Semble, a jury, or arbitrators, under the said Act, have power only to assess the value of the interest claimed.

Costs allowed to a number of persons, though they might have been represented by the same counsel.

This was a petition by persons interested in the Brandon Estates for the investment of money, which had been paid in as purchase-money under the 76th section of the Lands Clauses Consolidation Act, 1845, and the payment of the dividends of the funds in which the money should be invested.

The money had been paid in by the London, Chatham, and Dover Railway Company to the account of the trustees of the will of Samuel Brandon, the mortgagees of the estate, and the Ecclesiastical Commissioners.

It appeared that the railway company required certain leasehold property of which the trustees were lessees, and the Ecclesiastical Commissioners reversioners. The trustees claimed a right of perpetual renewal in the premises. The company considered that the trustees had failed to make out a title to the right: and they consequently inserted the name of the Ecclesiastical Commissioners in the title of the account,—on the assumption that the Commissioners would be entitled, in the event of the right of renewal not being sustained, to so much of the purchase-money paid into Court, as represented the value of that right.

J. H. Palmer, Q.C., and Hardy, for the defendants in the suit of Brandon v. Brandon; Glasse, Q.C., and Cracknall, for the plaintiffs in that suit; and Anderson, Q.C. (Walford with him), Elderton, Faber, Druce, J. T. Humphry, and Langworthy, for other parties interested in that suit,—supported the petition, and contended that their title, such as it was, had been purchased by the company at the sum paid in; and further, that, even if the sum paid in was to be treated as having been assessed by a jury or an arbitrator, under the Act, they were entitled to the whole amount,

Ex parte Grainger, 3 Y. & C. 62;

Ex parte Isaacchaud, 3 Y. & C. 721.

Bailey, Q.C., and Kekewich, for the railway company, cited, contra,

Regina v. London and North-Western Railway Company, 3 El. & Bl. 443;

Horrocks v. Metropolitan Railway Company, 4 B. & S. 315;

Chabot v. Lord Morpeth, 15 Q. B. 446.

Lindley, for the Ecclesiastical Commissioners.

Counsel also cited, and commented on, as to the jurisdiction of the Court,

Douglas v. North London Railway Company, 3 K. & J. 173;

and as to the question of costs,

Brandon v. Brandon, 32 L. J. 20;

Re Long's Estate, 33 L. J. 620;

Ex parte Sigyn, John. 387.

20 DEC. 1864.

KINDERSLEY, V.-C., decided that, on the dealings between the parties, the money paid in was the price of whatever interest the trustees had to give.

On the general question he was of opinion that, under the Lands Clauses Act, a jury, or arbitrators, as the case might be, had no power to do more than determine the value of the interest claimed. No provision had been made by the Act for such a case as the present was represented to be by the company. The company had no right to bring the reversioners into the matter at all; they must deal with them separately. The proper course would seem to be, that the Court should deplete by its own machinery, viz., by a reference to Chambers, what part of the price represented the interest the claimants could not substantiate, which should then be returned to the company.

With regard to the costs, though it was true that many of the parties might have been represented by one solicitor, and one set of counsel, the determination of which solicitor should have the conduct of this application must have been settled by a reference to Chambers in the suit of *Brandon v. Brandon*, a proceeding which would have involved costs, for which the company could not have been held liable. They must pay the costs of all parties to the petition.

Stuart, V.-C. } **AGRA AND MASTERMAN'S BANK**
15 DEC. 1864. } **(Limited) v. HOFFMANN.**

Injunction—Action at Law—Set-off—Bills of Exchange—Bankers' Lien.

The defendant discounted with his bankers, the plaintiffs, and was liable to them on bills not yet mature, but of which the acceptors were in difficulties, or had stopped payment. The plaintiffs refused to honour the defendant's cheque, and the defendant brought an action to recover the balance of his account. Afterwards several of the bills were dishonoured:—

Held, that the plaintiffs were entitled to an injunction to restrain the action.

This was a motion for an injunction to restrain an action at law.

The defendant's account at the plaintiffs' banking-house showed, on the 29th of September, 1864, a balance of about 4000*l.* in his favour. At that time, however, the defendant was liable to the plaintiffs, as drawer or indorser, on bills to the amount of more than 8000*l.* None of these bills had then arrived at

maturity, but several of the acceptors and other persons liable upon them were, to the plaintiffs' knowledge, in difficulties. More than 5000*l.* worth of these bills were afterwards dishonoured.

The plaintiffs also maintained that the defendant was, on the 29th of September, 1860, liable to them as a partner in the Calcutta house of Hoffmann & Co., which had just stopped payment, and which was liable to the plaintiffs on partially secured bills to the amount of more than 70,000*l.*

The plaintiffs also claimed a right to retain 1000*l.* as security, under a special contract with the defendant.

Under these circumstances the plaintiffs, on the 29th of September, 1864, refused to honour the defendant's cheques, and in consequence of such refusal the defendant brought an action for his balance of 4000*l.*, and for damages; to which action the plaintiffs had no defence, because their bills were still running. The plaintiffs accordingly filed a bill for an account, and now moved for an injunction to restrain the action.

Bacon, Q.C., Malins, Q.C., and Dickinson, for the plaintiffs, were stopped by the Court.

Greene, Q.C., and Bristowe, for the defendant.

1st. Bankers have no lien on their customers' money in respect of bills not yet due, and a contrary decision would shake the banking system. The banker's contract with his customer is to pay out the money on demand.

2nd. There can be no set-off here. The securities depend upon the value of produce, and the account, independently of the balance of 4000*l.*, when taken, may be in the defendant's favour. At all events, the plaintiffs have no equity to prevent our trying the question of special damage, though the Court might restrain execution,

Rawson v. Samuel, Cr. & Ph. 161;

Maw v. Ulyatt, 31 L. J. Ch. 33.

3rd. The plaintiffs are too late. The action was brought months ago, and is to be tried on the 19th instant.

Blacoe v. Wilkinson, 13 Ves. 454.

STUART, V.-C., without calling for a reply, said, that the case of the plaintiffs was, that an action had been brought against them by a customer for the balance of his account, notwithstanding that, at the time when the action was commenced, the customer was under large liabilities to them, which they had every reason to suppose would turn the balance in their favour. They claimed a right to retain their customer's money as a set-off against these liabilities. That was a very fair question to try. The plaintiffs impeached altogether the defendant's right to recover his balance, but at law they had no defence to his action, because his

liabilities to them were not, at the time when the action was brought, debts which could be set off at law.

To his Honour's surprise, the case of *Rawson v. Samuel* (*loc. cit.*), had been cited by the defendant as an authority in his favour. That case was wholly different. Lord Cottenham had there decided that there could be no set-off, because the right of the defendant at law had not been, and could not be, impeached by the bill. Lord Cottenham said (p. 178) "In the present case there are not even cross demands, as it cannot be assumed that the balances of the account will be found to be in favour of the defendants at law." Could his Honour assume that the plaintiffs in the present suit were not at law justified in retaining the balance? Lord Cottenham proceeded:—"Several cases were cited in support of the injunction; but in every one of them, except *Williams v. Davies*, it will be found that the equity of the bill impeached the title to the legal demand." The present bill did so; and in that state of things the Court was bound to restrain the action.

As to delay; the defendant was the last person who should complain of it. When the action commenced, he was under heavy liabilities to the plaintiffs, who, however, had not come into Equity till their bills were actually dishonoured.

If it should be decided on the hearing* that the bank had no right to retain the balance; then the question of damages could come on, when the damage was really ascertained.

Note.—See

The Alliance Bank v. Helford, 18 C. B. (N. S.) 460.

Wood, V.-C. } NORRIS v. COTTERILL
21 DEC. 1864. }

Practice—Service of Bill on Defendant out of Jurisdiction—Cons. Ord. X. r. 7.

The Court will make an order for the service of a bill on a defendant out of the jurisdiction, without requiring an affidavit as to the matter of the bill.

Murray Browne moved for leave to serve the bill in the above suit on a defendant out of the jurisdiction of the Court.

Wood, V.-C., said, that he had considered the rule alleged to have been laid down in *Cookney v. Anderson* (2 N. R. 140; s. c. 1 De G. J. & Sm. 365), to have been a mere dictum, and that he had continued to make such orders without regarding the subject-matter of the suit; but that since the decision in *Foley v. Maillardet* (3 N. R. 446; s. c. 1 De G. J. & Sm. 389), he had become of opinion that he could only make

* The case has been compromised.

such orders in cases that fell strictly within the provisions of the statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

His Honour then asked what was the subject-matter of the suit, and on its being stated at the bar that the subject-matter was Government stock, he made the order.

Notes.—See

Samuel v. Rogers, 1 De G. J. & Sm. 396 ;

Brooke v. Morison, 32 Beav. 652 ;

Baile v. Blanchet, 4 N. R. 48 ;

Steele v. Stuart, 3 N. R. 291 ;

Official Manager of the National Insurance and Investment Association v. Carstairs, 2 N. R. 348.

COMMON LAW.

Q. B. { *CARR v. THE ROYAL EXCHANGE*
4 Nov., 13 Dec. { *ASSURANCE COMPANY.*
1864. { *CARR v. MONTEFIORE.*

Marine Policy—Inconsistent Counts.

In an action on a policy, the declaration contained a count for total loss, and a count for recovery of premiums ; on the latter count the defendants paid money into Court, which was taken out in satisfaction of that count by the plaintiff. The plaintiff afterwards recovered for a loss on the other count, still retaining the premiums :—

Held, that the amount to which the plaintiff was entitled was the amount of the loss, deducting the amount of the premiums.

The action was on a policy on a ship called the "Dos Hermanos," and her cargo. It was tried at Liverpool at the Spring Assizes, and by consent it was turned into a special case. In the declaration there was a count for a total loss of the ship and her cargo, and the ordinary count to recover back the premium, on the ground that the policy never attached. On the count for the recovery of premiums, the defendants paid into Court 262*l.* 10*s.*, which the plaintiff took out in satisfaction of that count, and went to trial on the other counts. The case was argued in the Court of Queen's Bench, and carried to the Exchequer Chamber, where it was decided, affirming the decision of the Court below, that the plaintiff was entitled to recover under the policy. Before proceeding to trial, it had been agreed that in case the plaintiff should be held to be entitled to recover, as a total or partial loss, in the action, it should be referred to two average staters to calculate the amount. It was accordingly referred, and the arbitrators found the amount of the loss to be 2,038*l.* 11*s.* 7*d.* In making this award, they did not take into account the amount of the premiums taken out of Court by the plaintiff, conceiving that they had no power to do so, and that they were only empowered to find the amount of the loss on the vessel and cargo. Upon hearing the award, the plaintiff's attorneys took out a summons

to show cause why the verdict should not be entered and final judgment signed for 2,123*l.* 10*s.* 3*d.*, being the amount of the sum awarded by the arbitrators, with interest. The defendants took out a cross summons, to show cause why the proceedings should not be stayed, to enable the defendants to apply to the Court to reduce the amount by the premiums paid into Court, unless the plaintiff consented to the reduction. The summons on the part of the plaintiff was referred to the Court, and upon the defendants' summons an order was made.

Watkin Williams obtained a rule on the 5th of November last, to show cause why the judgment roll should not be amended, and judgment entered for the amount awarded, less the premiums paid into Court, and why the plaintiff should not pay the costs of the application, when having obtained a similar rule in a case of *Carr v. Montefiore*, a precisely similar case.

Milward now showed cause.

The plaintiff is entitled to retain the premium, as well as to recover on the policies, as the claims are distinct. The money paid into Court was paid voluntarily, and in a suit at law, and taken out by the plaintiff, and it is a strict principle of law that money so paid cannot be recovered back.

[COCKBURN, C.J.—How can that be? The clauses are inconsistent ; the claim for the premiums proceeds on the supposition that the policies had never attached, which was contradictory to the claim upon the policies.]

[CROMPTON, J.—There is a difficulty in deducting from a verdict on one count a sum of money paid into Court upon another. Before the time of Lord Mansfield it was the practice for the plaintiff, if he failed on the policy, to fall back on the claim for the premium, but Lord Mansfield would not allow him to do so unless he "opened" such a claim.]

[MELLOR, J.—Referred to

Emery v. Webster, 8 Exch.]

[COCKBURN, C.J.—Whatever may be the legal difficulty, I feel the matter would involve the most flagrant injustice. I do not, however, at present see the way to the remedy.]

Watkin Williams, and Cohen, in support of the rule.

Neither on technical, legal, or equitable grounds is the plaintiff entitled to retain the premiums. Technically he is only entitled to recover the nominal sum for which the verdict has been entered at the trial subject to arbitration, or to the amount of the loss: again, as to legal right, it is a clear principle of law that a party cannot recover on two or more counts in respect of the same substantial cause of action—*e. g.*, if a tradesman sued for goods sold, and on a bill for the amount, and also on account stated, he can only recover on one of these counts,

Early v. Bowman, 1 B. & Ad. 889.

[COCKBURN, C.J.—In the case you put, the counts were substantially the same, but in the present case the claims or causes of action were essentially different.]

They are really only one claim, and are rather alternative causes of action,

Gould v. Oliver, 2 M. & G. 235;

Cocker v. Tempest, 7 M. & W. 502.

In the latter case it is well laid down that the Court has unlimited power to govern its own proceedings, and will not suffer its own practice to work injustice.

Cur. adv. vult.

13 DEC. 1864.

CROMPTON, J., delivered the judgment of the Court:—

In these cases, the plaintiff having declared on policies of insurance with a count for money had and received, the defendants paid the amount of the premiums into Court on that count, pleading to the count on the policies, so as to raise, amongst other defences, that of unseaworthiness. The plaintiff took the money out of Court in satisfaction of the claim under the count for money had and received. At the trial, the defence of unseaworthiness having been abandoned, a special case was stated for the opinion of this Court, which was afterwards taken into the Exchequer Chamber, and in both Courts it was held that the plaintiff was entitled to recover as for an average loss.

The amount for the average loss was referred to and ascertained by an arbitrator, but this not being done before the argument of the case, a nominal judgment for 4,000*l.* was entered up for the purpose of taking the case into Error. The plaintiff is now to enter up his judgment, and take out his execution for the amount to which he is entitled, and he claims to be entitled to enter his judgment and take out his execution for the entire amount of the average loss, without giving credit to the defendants for the amount paid into Court and taken out by the plaintiff. The defendants obtained rules *nisi* in effect to restrain the plaintiff from taking judgment and execution for the entire amount of the loss without giving credit for the sums paid in respect of the premiums.

It is obvious that nothing could be more unjust than that the plaintiff should recover back the pre-

mium, which he could only be entitled to on the ground that the risk under the policy did not attach, and also the whole amount of the loss to which he could only be entitled if the risk did attach. It is plain that what the plaintiff was entitled to in the event which happened, was the loss, after deducting the premiums. It was said, however, on the part of plaintiff, that the state of the pleadings allowed them to perpetrate this injustice, and that the money which had been paid into Court, and taken out in satisfaction, could not in any way be treated as reducing the amount to which the plaintiffs were entitled in respect of their average loss. On the other hand, it was contended, that the deduction in question was one which a jury ought, on the trial, to take into account in reduction of damages. It was said that the jury, having ascertained the amount of the loss, have to inquire which is the damage to which the plaintiffs were entitled; and that there were many cases in which circumstances occurring after the *prima facie* damage has occurred, are allowed to reduce the damages. Thus part payment after action, has been held to reduce the damages; so in trover, the return of the goods given in reduction of damages. In the case of an executor *de son tort* who has interfered with the estate, and so converted it, if he has paid debts, he is "recouped," as it is called, in damages. It is unnecessary to decide this question in the present case, because we think that the Court has the power of preventing the plaintiffs from proceeding to carry out, by its process, such a piece of injustice as they are here contemplating. In *Gould v. Oliver* (2 M. & G. 235), where money was paid into Court, on a count inconsistent with that on which the plaintiff recovered, it was insisted that, by taking the money out of Court, the plaintiff had estopped himself from recovering on the inconsistent count. The Court held, that such estoppel ought not to prevail; but that each count must be dealt with independently of the rest of the record, but Tindal, C.J., remarked that the plaintiffs would not be permitted to retain the whole amount of the loss under the first count, and the amount of the general average under the second. This remark, though said not to be necessary to, or part of, the matter decided, was strictly pertinent to the matter under the consideration of the Court, being an answer to an objection that might have arisen, that, if there was not an estoppel, the plaintiff, having got the money, could not be made to part with what he had taken out of Court, and that the plaintiff could recover it twice over. "No," says the Chief Justice, "the Court would not allow him to retain it and take the whole loss besides."

Now here the plaintiff would get, besides his indemnity from loss on the policy, the amount of the premiums. In other words, he would get back the price he has paid, and the thing he has bargained for as well; we think he cannot be permitted to retain both.

The expression of the Chief Justice seems to point

to the inherent power in these Courts, by stay of proceedings or otherwise, to prevent the abuse of their process. For these reasons we are of opinion that the defendants are entitled to the relief which they pray for, and that the rule should be made absolute to prevent the plaintiff from signing judgment or issuing execution for any larger amount in respect of damages than the balance of the average loss ascertained by the average stater after deducting the amount of the premiums paid into Court.

Rule absolute.

Q. B. }
18 Nov. 1864. } *KEYES v. ELKINS.*

Pleading—Composition Deed—Release with Reservation of Rights against Sureties—24 & 25 Vict. c. 134, s. 192.

Action by the drawer of a bill of exchange against the acceptor.

Plea a composition deed containing a release by the statutable majority of the creditors, with a reservation of rights against sureties. The plaintiff was not an assenting party to this deed, nor a creditor having a surety:—

Held, that the plea was a good answer to the action, and that the release barred the plaintiff, though not an assenting party to the deed.

Demurrer to a plea.

Plea. That after the accruing of the cause of action in the declaration mentioned, and after action brought, the defendant effected a deed of arrangement under section 192 of the Bankruptcy Act, 1861, with his creditors, whereby, for the considerations therein mentioned (including the payment of a composition of five shillings in the pound), they absolutely exonerated, released, and discharged the defendant from all debts, claims, &c., due and owing by him to them, and from all actions, suits, and causes of action or suit for or in respect thereof, provided always that the said release should not in anywise prejudice or extend, or be construed to extend, to prevent any of the creditors from claiming or realising any security now held by them or any of them, or from suing any person or persons other than the said debtor liable to payment thereof for the recovery thereof less the amount received by them or any of them under these presents, nor in any way prejudice or affect the rights or remedies of any such creditors (except as against the said debtor) to which, but for the signing or agreeing to the deed, they might severally have recourse, that all things necessary to make the said deed valid and binding on all the defendant's creditors had been performed, and that the plaintiff, as being one of such creditors, was bound in like manner, as though he had executed or assented to the deed, &c. &c.

Demurrer.

Replication. That at the time of the making of the

said deed certain of the said creditors held securities for debts then due from the defendant, and persons other than the defendant were liable to payment of some of the said securities, and that at the same time divers persons other than the defendant were liable as joint debtors with and sureties for the defendant for divers of the debts then due from him.

Demurrer and joinder in demurrer.

Plaintiff's points for argument. That unless the deed would at Common Law without the statute be a bar to an executing creditor, it is no bar under the statute.

That it is no bar at Common Law.

That it contains apparent inconsistencies, which must be reconciled if possible in such a way as to give some effect to every part.

That if he be held to be a satisfaction or a release, then no effect is given to the clause for keeping alive the remedies against third persons, such as joint debtors and sureties, because a release of the defendant would unquestionably discharge them.

That if it be held *quoad* protection to the defendant to be only a covenant not to sue, this keeps alive the above-mentioned remedies, and so gives effect to the clause above referred to.

Defendant's points:

That if the plaintiff had executed the deed, his debt would have been released, and by the statute the assent of the required majority binds the plaintiff as if he had executed it.

That the deed contains no inconsistency, that it is both a satisfaction of the defendant's liability, and a release to him, and may be qualified so as not to discharge joint debtors and securities.

That it may be that there is no joint debtor, or any surety, affected by the provision referred to, and if so such provision does not prevent the deed from releasing the defendant from all his debts.

That the plaintiff's action is barred by the deed, it being a deed of composition and release.

Cleasby, Q. C. (Prentice with him), in support of the demurrer.

The deed is not pleadable, because it contains no absolute release,

Ipsstones Park Iron Company v. Pattinson, 3 N. R. 514; 33 L. J. Ex. 198.

It contains a release, but only in those cases where there is no surety. The remedies against the sureties are reserved, which could not be the case if there was an absolute release. The release thus qualified, must be looked upon as a covenant not to sue, and a covenant not to sue is not pleadable in bar to an action by non-assenting creditors, because it is personal to the creditors who execute,

Wells v. Hacon, 4 N. R. 99;

Eyre v. Archer, 16 C. B. (N.S.) 638;

Dell v. King, 2 H. & C. 841; 3 N. R. 436;

Hidson v. Barclay, 33 L. J. Ex. 273; 4 N. R. 341.

Mellish, Q. C., for the defendant.

COCKBURN, C.J.—Our judgment must be for the defendants. In this case there was what we must call, as far as Mr. Cleasby's argument goes, a qualified release, a release with a reservation on the part of the creditors against the sureties and co-debtor, that was not so in the case in the Exchequer. Mr. Cleasby says, because it is qualified it does not operate as a release, but only as a covenant not to sue: he admits the effect of a release, and that a covenant not to sue would be pleadable as a bar, but denies that it would have that effect where a creditor who had not executed it is made a party to the deed by the statute under section 192. In that section the "execution" means the execution of all the creditors, and the outstanding creditor is in exactly the same position as the rest of the creditors who have executed. If, therefore, the deed is pleadable as a bar in the one case, it would be so pleadable in the other. I think, however, that this deed contains a good release. Mr. Mellish rightly says there is here a release by all the creditors, except those who have sureties against whom they may enforce their rights: but here there is no one whom the plaintiff can proceed against, and therefore it operates as an absolute release. Then it may be said the reservation creates an inequality: the statute says nothing about the inequality, but merely provides against unreasonableness in a deed: the inequality, however, is an ingredient in considering the reasonableness of the deed. This inequality must be substantial if it is to make the deed bad, and here in the one case there is an absolute release, in the other a covenant not to sue. In either case the effect is the same, which is to stop the creditor from pursuing his remedy: that being so, there is no inequality, and therefore the deed is a good one. There is a release of the debt, and the plaintiff is bound by it, having no security against whom he can proceed, and I am of opinion, therefore, the plea is good.

CROMPTON, J.—I concur, and I think there is no inequality in the deed; the parties assenting or non-assenting are bound by the same terms. Mr. Cleasby says it does not operate as an absolute release, but only as a covenant not to sue. I think it does not operate as a release destroying all debts; for if there followed a destruction of the debt, and the discharge of the surety, the non-assenting creditor would be put in an unfair position. Therefore, in framing the deed, there must be a provision for keeping up remedies against sureties. This is different from the *Ipsstones Park Case* in the Exchequer, where there was no agreement for not suing the debtor. We must see what the deed says: now taking it as an agreement not to sue, it is a good legal if not equitable plea to the action: the creditors say in fact, "We will take the agreement you have made in discharge and satisfaction, and never bring an action for it:" and having so agreed, they execute a release. After such an agreement, no Court

of Equity would allow an action to be maintained, but would say, "No, you are barred by this deed." I think the deed is a fair deed, with regard to the clause reserving rights against the sureties, and the case of *Clapham v. Atkinson* (3 N. R. 370) is in support of this view. There there was an agreement to execute a release instead of a covenant not to sue as there is here, but they are similar things, for either would make a good equitable plea.

MELLOR, J.—I am of the same opinion. The object of the section in the Act, was to enable a large majority of the creditors to make an arrangement with the debtor, most likely to ensure for the benefit of all the creditors; but, as by the statute the majority have power to bind the minority, for that reason it is necessary that the deed should be a reasonable one: but I am clearly of opinion, that the moment it is executed, if it is reasonable, then all are bound by it. If this clause reserving remedies against sureties were not inserted, great injustice would be done to those who had sureties to look to. I am of opinion that the provisions of this deed operate as a discharge of the debtor from his liabilities to all his creditors.

SHEE, J., concurred.

Judgment for the defendant.

Adm. } THE LAUREL.
6, 13 DEC. 1864.

Before the Right Honourable DR. LUSHINGTON.

*Bottomry—Excessive Charges—Advertisement—
Maritime Interest.*

The master in a port of refuge consigned the vessel to a merchant to advance money for her repairs, the law of the country allowing a lien on the vessel for such advances: no agreement was made at the time whether the advance was to be made on personal security or on bottomry; and the merchant did not himself determine on having bottomry security until shortly before the ship sailed, when he demanded a bond, which the master executed:—The Court upheld the bond.

An excessive charge for commissions may be a reason for impeaching a bottomry bond on the ground of fraud, but cannot otherwise affect its validity.

It is proper for the master to advertise previous to taking advances on bottomry: but a bottomry bond is not invalid if no advertisement has been made.

A bottomry bond, if it expresses a maritime risk, is not invalidated by the absence of any provision for maritime interest.

The question at issue in this cause, was the validity of a bottomry bond upon "The Laurel" and her freight, taken under the following circumstances:—

"The Laurel" belonged to Messrs. Willis & Co., of London, and in 1862 was returning from Shanghai to London, having on board a very valuable cargo of tea and silk. On the 24th of October she struck upon a

rock in the Java sea: she was got off, but, though she did not make much water, the crew refused to navigate her to Europe. The master telegraphed for advice and assistance to the British Consul at Batavia, a Mr. Maclachlan, but he declined to intervene, unless the vessel was brought to Batavia and surveyed. Mr. Maclachlan was a partner of the firm of Maclaine, Watson & Co., in Batavia. Accordingly, on the 31st of October, the vessel was brought to Batavia and surveyed: the cargo was then discharged, and the vessel put into dock for repairs. As the owner of the ship had no agents in Batavia, the master was in doubt to whom to consign the vessel. He chose the firm of Maclaine, Watson & Co., who were Lloyds' agents at Batavia, chiefly on the ground that they were connected with Messrs. Maclaine, Fraser & Co., of Singapore, who were the agents of the shipowner in that place, of which fact he informed Maclaine, Watson & Co. The arrangement between the master and Messrs. Maclaine, Watson & Co., was simply that the firm should advance the money for repairs at two and a-half per cent., as the master understood, on the cost of the repairs, and five per cent. upon other disbursements. Whilst the repairs were in progress, the master became aware that Messrs. Maclaine, Watson & Co. meant to charge a commission of two and a-half per cent. upon the value of the cargo, instead of two and a-half per cent. upon the cost of the repairs: he protested against this, but received for answer that such a charge was usual.

On the 28th of November, James Maclachlan wrote to one of his partners in England:—

"I forgot to mention to you last mail, that the English ship, 'Laurel,' bound from Shanghai to London with tea and silk, put in here, having got ashore on Brewer's Reef, and has had to discharge all her cargo. Her owners are John Willis & Sons, 18, East India Chambers, Leadenhall Street, I believe highly respectable people. The captain places his ship in our hands, as Maclaine, Fraser & Co., are the owner's agents at Singapore. The cargo is a very valuable one, about \$1,300,000; so that we will get a handsome commission. I am not yet sure, if it will not be better to take a bottomry on the vessel, but have written Watson, at Singapore, about the owner, and wait his answer before deciding anything."

Again, on the 13th of December, another of the partners in Batavia, wrote to the same partner in London:—

"The 'Laurel' has again her cargo on board, and will sail to-morrow. We are now busy settling her account with Captain Garrick, for which he is to give us a draft on his owners, John Willis & Sons, and a bottomry bond as collateral security. We remit said bill and bond to Finlay, Hodgson & Co., who we hope will have no difficulty in collecting said amount. Watson, of Singapore, wrote Maclachlan favourably about said owners, and he would take the captain's bills on them for 1000*l.*, more or less; but as the

expenses incurred amount to more than three times as much, I thought it would be better to take a bond."

This statement was borne out by the master, who deposed that the first occasion of the subject of bottomry being mentioned to him, was on this 13th of December, when one of the partners told him that, besides the draft on the owners for the amount due, he must give a bottomry bond as additional security; but that upon the bond no extra commission would be charged. A bond was accordingly on that date given on ship and freight for 4088*l.* 17*s.* 4*d.* (of which only one-third was for expenses actually incurred, the remainder being made up of commissions). The bond specified no rate of interest; but in other respects, was in the usual form. It appeared also that the law of Batavia gave a lien upon the ship for advances made for the purpose of repairs. Upon the arrival of the "Laurel" in London on the 7th of April, 1863, her owners refused to honour the draft of the master; and thereupon the holders of the bond, Messrs. Finlay, Hodgson & Co., arrested the vessel, and instituted the present suit for the enforcement of the bond.

Deane, Q.C., and *Clarkson*, for the plaintiffs, argued, that the bond was good, upon the grounds stated in the judgment, insisting in particular upon the fact that the advance was not made upon any agreement of personal credit, and that the law of Java gave the merchant a lien on the ship for his advances,

The Alexander, 1 Dod. 278, 280;

The Prince George, 4 Moo. P. C. C. 25.

Brett, Q.C., and *V. Lushington*, for the defendants.

We contend that there was an agreement for an advance on personal credit, and that the bond was really taken only to cover the extravagant commissions. At any rate there was no pre-agreement for bottomry, and such is necessary upon authority, and for reasons of fair dealing,

The Hersey, 3 Hagg. 412; 3 Moo. P. C. C. 83.

There is no proof that the law of Java gave a lien for the commissions; and the power of arrest, or even actual arrest, will not support a bottomry bond,

The Augusta, 1 Dod. 288;

The Osmanli, 3 Wm. Rob. 198, 215;

The Aurora, 1 Wheaton, 104.

We also contend that as the advances were made without agreement, there was no necessity for the subsequent bond,

The N. R. Gosfabrick, Swa. 344;

The Oriental, 7 Moo. P. C. C. 409.

Deane, Q.C., replied.

DR. LUSHINGTON.—One of the arguments against the bond was the absence of advertisement. This is sometimes an ingredient in evidence of fraud, in cases where it is proved that the money might have been had on better terms. But this is not the present case; and though advertisement is always expedient, I

cannot say that it is indispensable. It is of importance to consider what passed between the parties at the time when Maclaine, Watson & Co. accepted the consignment of the vessel. In my judgment, there was nothing beyond an arrangement (and that not a distinct one) as to the commission to be charged; not a word was said by either party as to the security upon which the advance should be made, whether upon bottomry or upon the personal security of the owner. No mention of bottomry was made to the master until the repairs had been completed and the bond was presented for execution; an omission for which, though it may not invalidate the bond, I think Messrs. Maclaine, Watson & Co. were, in fair dealing, greatly to blame. It is most desirable that both the merchant and master should, at an early stage in the proceedings, have a distinct understanding whether the advances are to be made on personal credit or upon bottomry. Upon consideration of all the facts, I think that this case cannot be distinguished from that of *The Alexander* (1 Dods. 278): in both there is the absence of any agreement to advance on personal credit, and of waiver, direct or indirect, of the right by the *lex loci* to make the ship liable for her repairs. The fact that in the present case Messrs. Maclaine, Watson & Co. were doubtful, almost up to the last, whether they should take a bottomry bond or not, does not, I think, constitute a substantial difference. On the other hand, this case is distinguishable from that of *The Augusta* (1 Dods. 288). There Lord Stowell refused to allow a bottomry bond, so far as it covered an advance which had been made upon personal credit; here there was no agreement that the advance should be upon personal credit.

Then, as to the terms of the bond itself, I do not think the absence of any provision for bottomry premium is material, inasmuch as the maritime risk is clearly expressed.

Lastly, the large amount of the commissions charged is no reason for invalidating a bottomry bond altogether, unless the bond is impeached on the ground of fraud, which is not the case here.

I shall therefore pronounce for the validity of this bond, and refer the accounts to the Registrar and merchants in the usual way. I reserve the question of costs.

Adm.)
13 DEC. 1864.) THE BAHIA.

Before the Right Honourable DR. LUSHINGTON.

Bill of Lading—Duty to Carry on, Trans-ship, or Deliver—“Reasonable Time” allowed to the Master—Law of the Flag—Lex loci contractus—Lex fori.

The agreements as to the duty of the master to carry on, trans-ship, or deliver the goods at an intermediate port of refuge, to be implied in a bill of lading given by the

master of a foreign vessel, will be ascertained by reference to the law of the flag which the vessel carried, not by reference to the lex loci contractus, or the lex fori, or the law of the place where the alleged breach of contract by the master is committed.

If a vessel during her voyage is injured, and is compelled to put into a port of refuge, then, by English law, the master is not bound to trans-ship. He is allowed a reasonable time either to repair and carry on or to trans-ship. If he absolutely declines to do either, he may be called upon to deliver without payment of any freight; but before a reasonable time has elapsed, he cannot be required to deliver, except on payment of full freight or waver thereof.

In estimating what is a reasonable time, the Court will take all circumstances into consideration, including any delay caused by the vis major of competent authorities, whether administrative or judicial.

A bill of lading in English is given by the master of a French vessel lying in New York, by which the goods are made deliverable in a French port. The vessel, during her voyage, suffers injury, and puts into a port in England. The assignee of the bill of lading, and owner of the cargo, being a British subject, institutes an action in the British High Court of Admiralty for a breach of duty by the master in respect to his obligation to carry on, or trans-ship, or deliver. The Court will ascertain the duty of the master by reference to the law of France.

This suit was instituted under the 6th section of the Admiralty Court Act, 1861, which provides that “the High Court of Admiralty shall have jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.”

The vessel proceeded against was “*The Bahia*,” a French barque belonging to the port of Marseilles. The plaintiffs were Messrs. Dumas, Hankey & Co., merchants residing in London, owners of a cargo of corn shipped on board “*The Bahia*.”

The facts of the case were as follow:—

On the 17th of September, 1862, “*The Bahia*,” whilst lying at the Danish island of St. Thomas, was chartered to Mr. A. H. Solomon, of New York. The voyage was to be from the port of New York to Queens-town, for orders to discharge at a port in the United Kingdom, Havre, or Marseilles, a provision which was afterwards extended to Dunkirk. The charterer undertook to load a complete cargo, and to pay freight at so much a quarter, and to advance money for ship’s necessary disbursements in New York, subject to insurance. The master engaged to receive on board

all such goods as the charterer or his agent might think proper to ship, and to sign bills of lading without prejudice to the charter-party.

Early in November, 1862, the vessel being then at New York, Messrs. Sautier & Wierum, merchants of New York, shipped on board "The Bahia" 17,080 bushels of corn—a complete cargo, and on the 5th of November the master signed bills of lading. These bills of lading were, like the charter-party, in English; they made the corn deliverable in good order at the port of Dunkirk in France unto order or assigns, he or they paying freight for the said corn as per charter-party.

These bills of lading were afterwards assigned to the present plaintiffs, and they were the owners of the corn.

On the 12th of November Solomon transferred his interest in the charter to the shippers Messrs. Sautier & Wierum, by the following indorsement on the charter:

"New York, 12th Nov. 1862.

"I hereby transfer my interest in the said charter to Messrs. H. Sautier & Wierum.

"A. H. SOLOMAN.

"H. SAUTIER & WIERUM."

And on the 18th of November there was another indorsement, to the effect that the master had received from Sautier & Wierum at New York in advance of the freight 469*l.* 3*s.* 4*d.* subject to insurance by the freighters.

The ship then sailed on her voyage, but met with bad weather, and sustained considerable damage; and on the 7th of January, 1863, she put into the port of Ramsgate in distress.

The master of the ship, a person of the name of Dugas (who had succeeded to the former master, Captain Blanc), reported himself to the French Vice-Consul at Ramsgate, Mr. Charles Weber, who was also a member of the firm of Hammond & Co., who acted as the agents for the ship. By direction of the Vice-Consul, various surveys were held on the ship and cargo, and in pursuance of these surveys the whole of the cargo was discharged and warehoused in Ramsgate, part in the Pier Stores belonging to the Board of Trade, and hired for the purpose by Hammond & Co., and part in stores belonging to Hammond & Co. themselves. The corn was found to be heated; it was therefore duly separated before being stored, and proper measures for its preservation were taken by Hammond & Co. under the direction or approbation of an agent appointed by the plaintiffs Dumas, Hankey & Co., the owners of the corn.

On the 2nd of February, 1863, the surveyors appointed by the Vice-Consul reported that the expense of the necessary repairs of the ship would amount to the sum of 2,918*l.* 18*s.* It was admitted at the hearing that this estimate was correct, and that the sum named would exceed the value of the ship if repaired.

Upon this survey, the master, about the same date (February 2), executed, before the Vice-Consul, a deed of abandonment of the ship to the underwriters; and notice of abandonment was given by the owner of the ship, M. Bonnefoi, a merchant resident at Marseilles, to certain French insurance companies, with whom the ship had been insured for 3,200*l.*, a sum stated in the policy to be the value of the ship by common appraisement.

The insurance companies refused to accept the abandonment, and applied to the Consul-General of France in London to allow them to remove the ship from Ramsgate to Dunkirk, there to be surveyed and repaired if the expense there would allow. The exact date of this application was not proved, but it appeared from Mr. Weber's evidence that the Vice-Consul declined to give the certificate of unavailability, stating that he was prevented by the orders of the Consul-General.

By French law, it was proved, a master is not at liberty to abandon upon his own view that the ship is unavailability; the abandonment is not complete until the deed of abandonment has been legalised by a certificate of unavailability from appointed authorities: in a case like the present the authority would be the French Vice-Consul. Usually, such a certificate follows immediately, as a matter of course. It was, therefore, probably shortly after the 2nd of February that the Consul-General gave the insurance companies the authority they demanded, to remove the vessel to Dunkirk for repairs; but before it was acted upon they obtained an order to the like effect from the Tribunal of Commerce at Marseilles. The judgment of this tribunal was dated the 4th of March. The proceedings at Marseilles to procure this order were between the insurance companies on the one hand, and Bonnefoi, the owner of the ship, on the other. Dumas, Hankey & Co., the owners of the corn, were not parties to the suit at all, but the judgment expressly stated that "the owners of the corn, not having been represented in the cause, there was reserved to them the right to appeal, on such points as they might think proper, against the decision given between the owner and his underwriters." Of this judgment the plaintiffs had notice, if not formally, at least from the defendant, who, in his letter to them of the 4th March, added a copy of the judgment. Bonnefoi appealed from the decree to the Imperial Court of Aix, but the decree was "exécutoire sans appel," that is, its execution might be enforced at once, and was not stayed pending the appeal. The decree was in fact affirmed by the Court of Aix, on the 25th of March, 1863, and ultimately by the Court of Cassation, on the 22nd of March, in the present year. Both the judgments were in evidence.

While this litigation was being instituted in France, the cargo remained warehoused at Ramsgate, and some correspondence had taken place between Messrs.

Dumas, Hankey & Co., who were most anxious to get their cargo, and M. Bonnefoi.

The following passage from a letter of Dumas, Hankey & Co. to M. Bonnefoi, dated 23rd of January, 1863, shows the different terms at first offered by the plaintiffs, and demanded by the master, as the conditions on which the cargo might be handed over at Ramsgate:—

"The master claims payment of his freight to Ramsgate, in proportion to the distance traversed by the ship from New York, taking for the basis of his calculation the amount of freight from New York to Dunkirk. In accordance with the custom, we are willing to pay him the whole of the freight from New York to Dunkirk, as regulated by the considerations mentioned in the charter-party, less the cost of transport from Ramsgate to Dunkirk."

Shortly afterwards, however, M. Bonnefoi himself wrote a letter to the plaintiffs demanding that they should pay into the hands of the master the entire charter-freight, without deduction of any kind, even of the advances in New York. It was admitted by the counsel for the defendant, that if the master was bound to give up the cargo on payment of the full freight, these advances must be deducted.

Subsequently also, viz., on the 11th of March, Mr. Stibbard, solicitor to the plaintiffs, went down to Ramsgate, saw the master, and then offered, if the master would give him the cargo, to deposit in a bank the whole sum claimed, and to sign the usual average bond. The master then replied that he would not give up the cargo, unless the full charter-freight was paid to him without deduction. This was in accordance with M. Bonnefoi's letter to the plaintiffs of the 7th of March, and also, it appears, with the directions given to Hammond & Co.

On the 13th of March, Dumas, Hankey & Co. instituted this cause, under the provisions of the 6th section of the Admiralty Court Act, 1861, and on the 14th of March arrested the ship. The plaintiffs subsequently obtained possession of the corn, and conveyed it in other vessels to Dunkirk. The portion warehoused in the Pier Stores they obtained on the 23rd of March, and the other part on the 27th of April. It is not necessary to state by what means they so obtained possession, as it was not disputed that it was without the consent of the owner and master of the vessel.

The corn, upon its arrival at Dunkirk, was arrested by M. Bonnefoi for the freight due to him under "The Bahia's" charter. Dumas, Hankey & Co. intervened as owners of the corn, and, after discussion, the Tribunal of Commerce at Dunkirk, on the 29th of July, 1863, pronounced judgment, declaring that the present plaintiffs, having withdrawn their goods in consequence of being unwilling to await the solution of the question, whether the vessel could or could not be put into a proper condition, owed the entire freight less only the advances at New York.

The substance of the complaint in the petition was, that the master had refused either to re-ship or to transship, or to deliver, in short to do anything, and that the plaintiffs had thereby suffered damages.

Sir G. Honyman and Clarkson, for the plaintiffs.

Brett, Q. C., and *V. Lushington*, for the defendants.

The arguments by counsel were—first, as to what law was applicable to the case, whether the law of England, or France, or New York; secondly, as to what was the effect of each of these laws under the circumstances of the case. These arguments will be found set forth in the judgment.

DR. LUSHINGTON.—Great part of the argument was upon the question, as to which country furnished the law for regulating the obligation of the master to the plaintiffs under the actual circumstances. This point I will proceed to consider, though I am doubtful whether this will prove to be necessary for the decision of the case. First, then, this cannot properly be called a question of construction, for there is little or no dispute as to the meaning of the terms of the bill of lading. The question rather may thus be stated generally: given an agreement between two parties, what is the law that was actually contemplated or must be taken to have been contemplated by them as the law for determining what mutual obligations not expressed should be implied. Judged by this test alone, the British law would not, I think, be applicable: for neither of the parties to this contract, which was evidenced by the bill of lading, contemplated the application of British law. Neither of the parties was a British subject, nor was the port where the contract was made a British port, nor was it intended that the vessel should go to a British port. If then British law be applicable, it must be that it was brought in by after-circumstances, irrespective of the original contract. As to this, it was said that though the shippers were American, the indorsees of the bill of lading were British subjects. But this was a mere accident, and may be disregarded. Then it was said that the place where the alleged wrong was committed by the master was a British port, and that the *lex fori* which has to adjudicate upon this alleged wrong is British law. Now there is no doubt that in case of a foreign ship coming from distress of weather within local British jurisdiction, both ship and cargo are in many respects subject to British law. They would be so, *e.g.*, in respect of pilot dues, port dues, quarantine regulations, and other matters of that description, and also as to any particular enactments which, by the law of the land, are expressly applicable to ships in general; but it does not, therefore, follow that the terms of a contract of affreightment of the cargo should be governed by English law. For were this the rule, then if a British ship were found in a French port, her owners would have to submit to French law, and all charter-parties and bills of lading

would be governed accordingly. Save therefore so far as the *lex loci* is applicable *ratione loci* or *ratione fori*, I cannot hold that British law is applicable to this case; and I think that a British Court, having to adjudicate with respect to the contract, should adopt the Foreign law which had from the beginning been contemplated as binding between the contracting parties.

In the present case, this must be either the French law or the New York law, for it was not contended that the law of St. Thomas, where the charter was made, governed the contract between the master and the shipper. Which then of these two laws ought to prevail? The facts, on which reliance is placed in order to prove the New York law to be applicable, are, that the bill of lading was made at New York, and in English—that is, the language of New York, and in terms not unusual in American contracts of affreightment. On the other hand, the circumstances in favour of the applicability of the French law are, that the vessel was a French vessel, owned by a resident in France: and that the contract was to be finally executed in France, for the port of destination was Dunkirk. Now, if the Court were to pronounce in favour of the law of New York, as the *lex loci contractus*, the practical effect would be, that a master of a ship touching at ports of different countries, and taking goods from thence, would on his arrival at any intermediate port or at the port of destination find himself and his ship subject at the same time to the different laws of several foreign countries—a result nothing short of confusion. Again, it is to be remembered that the master was but an agent, acting for an absent principal, that principal being a domiciled native of France. If, therefore, the law of the flag of the vessel be adopted, but not otherwise, the shipowner would be able to measure beforehand the character of his duties and liabilities as a carrier, and all the contracts of the same nature entered into by his agent abroad would be regulated by a uniform principle. Nor could the shipper have any reason to complain: for the flag of the vessel would be sufficient notice to him of the law by which his contract of affreightment, if he chose to enter into one, would be governed. The case of *Lloyd v. Guibert* (4 N. R. 264) is a direct authority for this position. Accordingly, in the present case, “The Bahia” being a French vessel, I incline to consider that, so far from inserting by implication into this bill of lading any agreement to accept the law of New York as to the mutual rights of masters and consignees of cargo as to trans-shipment, &c., the master had no authority to bind the shipowner to accept the law of New York; and that the shipper must be taken to have known beforehand that, if circumstances like the present should arise, the dispute would have to be settled by French law. I should add, that if I were to decide this case by the law of the State of New York, I could not hastily come to the conclusion that it was the same as that of England, without some direct proof.

However, although my opinion is strongly in favour of the applicability of the French law exclusively, I think it will be more satisfactory if I consider, not only what would be the results according to French law, but what would be the results according to New York law, supposing that to be the same as British law.

The laws of both countries, France and England, as to contracts of affreightment, however they may differ in particulars, have one object—to do justice to both parties, the master and the owner of the goods; to secure to each the full benefit of the contract, so far as it is not unfair to the other. Suppose, then, a ship, through injuries occasioned by perils of the seas, is forced during her voyage to put into an intermediate port, it would be unjust to the owner of the goods that his goods should be detained there an indefinite time: but, on the other hand, it would be unjust to the master that he should forthwith be prevented from earning his freight. The question is, Within what limits of time, or other conditions, the laws of the two countries allow to the master the option of repairing and carrying on, or trans-shipment or delivering?

First, then, as to French law. The materials on which the Court has to found its judgment are the Articles in the Code de Commerce; secondly, the opinions of French lawyers, which have been produced in evidence; and thirdly, the decrees of the French Courts in this particular case. As to these last, it is perfectly true that the judgments of the Tribunal of Commerce at Marseilles, the Imperial Court of Aix, and the Court of Cassation—all given in the action between the underwriters and the shipowner—may not be binding upon the plaintiffs, who are the owners of the cargo, and were not parties. But it is not to be forgotten that the plaintiffs would have been allowed to intervene, and had notice of this liberty in M. Bonnefoi's letter to them of the 4th of March. So, too, it is true that the judgment of the Tribunal of Commerce at Dunkirk, though given between the parties, is not absolutely conclusive in the present case; for it is conceivable that in an action for freight the shipowner may be entitled to full freight, and yet that a cross-action may lie against him by the owner of the goods for damages. I apprehend, however, that the declarations of the French tribunals in each of these several judgments are admissible as evidence to show what the French law is. By the French law, in the event of the ship being forced to put into an intermediate port from injuries received, there is, in the first place no absolute obligation upon the master to re-ship and carry on. That, indeed, is often impossible; the ship may have been lost, or have received irreparable injuries. Secondly. There is no absolute obligation to trans-ship:—the obligation arises only in the event of the ship having been declared unnavigable by competent authority. (Code, Art. 296, 390, 391.) Thirdly.

There is no unconditional obligation to deliver. The master may, if he think proper, insist on delivering, and then he is entitled to freight *pro rata itineris*. (Code, Art. 296.) In the present case, the master did offer to deliver, but only upon terms of his receiving full freight, without even any deduction for freight already paid in advance. This clearly was a demand for more than the master was entitled to, as was admitted at the bar. On the other hand, the French law allows to the owner of the goods, if he think proper, to demand delivery, but, in that case, requires him to pay the full freight due. (Code, Art. 293, 296.) This entire freight the plaintiffs never offered to pay—they only offered to deposit it with a bank. No French authority was produced to show that an offer to deposit is equivalent to a tender of payment, so as to entitle the owner of the cargo to delivery. The plaintiffs, however, did also make an offer of payment, but that, so far from being an offer to pay the whole freight less the advances, was not even an offer to pay freight *pro rata itineris*; it was an offer to pay the whole freight less the expenses of carrying on the cargo from Ramsgate to Dunkirk. A *pro rata* freight is quite a different thing, being calculated upon the distance actually accomplished of the whole voyage, and independent of the consideration of the expense required to complete the remainder. The plaintiffs, therefore, were by French law never entitled to delivery. It is true that the master made an exorbitant demand, but of this the plaintiffs cannot complain, if they were never willing to pay what was legally due from them. The plaintiffs had in their possession all the knowledge necessary to enable them to ascertain what was the amount of freight due.

The negotiations for delivery having thus failed, the master had still the option either to repair and carry on, or to trans-ship. The plaintiffs contended that the master did decline either to carry on or to trans-ship. But I think this is not proved by the evidence. It is true that the defendant never offered to trans-ship; but the question of trans-shipment never arose: it could not, in fact, arise whilst the question of abandonment was still in abeyance: and beyond all doubt, it was in abeyance. The master, indeed, was desirous to abandon, and had executed a deed of abandonment: but this was ineffectual until he had obtained a certificate of unnavigability from the authorities. For this certificate he applied, but was prevented from obtaining it by the action of the underwriters in the French Courts. Indeed, so far was the master from having finally abandoned his vessel, that if the Dunkirk surveyors had reported unfavourably to the right of abandonment, it is fair to conclude he would have had the vessel repaired. The fact was, the question of abandonment was a question, to use the French phrase, "awaiting solution;" and, till it was settled, the master could neither abandon nor trans-ship.

Then I think it clear that the French law will allow the master a reasonable time to determine whether he will carry on, and, in the event of his determining not to carry on, a further reasonable time, whether he will trans-ship or deliver. The only question is, whether the delay required to settle the litigation in France between the shipowner and the underwriters can be considered a reasonable delay as between the master and the owners of cargo. A consideration of the 296th Article of the Code, of the opinions of the French lawyers given in evidence, and of the judgment of the Tribunal of Commerce at Dunkirk, leads me to the conclusion that, according to French law, the plaintiffs, as owners of cargo, were bound to await the solution of the question pending between the shipowner and his underwriters. This may seem hard upon the plaintiffs, seeing that the litigation did not finally close until the judgment of the Court of Cassation on the 22nd of March, 1864—after the lapse, that is, of more than a year from the date of the vessel putting into Ramsgate—and that this final judgment, like its precursors in the inferior tribunals, was against the shipowner, and is conclusive that the shipowner was, by French law, not justified against the underwriters in resisting their application. But, as against this must be set several considerations: first, that the plaintiffs are estopped from denying the right of the defendant to resist, at all events in the first instance, the application of the underwriters, inasmuch as the plaintiffs have admitted the accuracy of the Ramsgate surveys, showing that the repairs of the vessel would exceed her value. Second, that though the final sentence by the Court of Cassation was not delivered for fourteen months, the date of the first sentence in the Marseilles Court was on the 4th of March, 1863, a little more than a month after the date of the Ramsgate survey; and that the sentence, being "exécutoire sans appel," might have been enforced immediately; and that by the plaintiffs themselves, to whom liberty to intervene was expressly reserved. Third. That on the 14th of March, 1863, the plaintiffs arrested the vessel, and took possession of the cargo, partly on the 23rd of March, partly in the following month of April. These acts of the plaintiffs reduce the total delay to a period of a few weeks only, and during this period, assuming that the surveys were right, as admitted by the plaintiffs, the defendant was not idle: he sought to abandon the vessel, he exerted himself to procure the certificate of unnavigability, and with this view resisted the application of the underwriters to have the vessel removed to Dunkirk.

Under these circumstances, I must hold that, if the case be judged by French law, the plaintiffs are not entitled to recover from the defendant. But in holding this, I do not decide that a master of a vessel would not be answerable to owners of goods for a long and unreasonable delay, caused by a litigation im-

properly carried on by himself with his underwriters. But that is not the present case.

Now as to the law of the State of New York. Assuming it to be the same as the English law, it will be found in many important respects to coincide with the French law. The chief authorities on the subject are collected in Mr. Brett's argument in the case of *Blasco v. Fletcher* (3 N. R. 38; 14 C.B. (N.S.) 147), to which the Court is much indebted. The result may be stated as follows: First. There is and can be no absolute obligation on the part of the master towards the owner of goods to forward them in the original vessel, although of course it is the duty of the master, in his capacity of agent to the shipowner, to do so if he can, *Benson v. Chapman* (2 H. of L. Ca. 720). Second. It has never yet been decided that the master in any case is bound to trans-ship; all that has been decided is, that he is at liberty to trans-ship. *The Hamburg* (32 L. J. Adm. 162), and cases there cited. Third. There is no absolute obligation to deliver at the intermediate port, unless full freight be paid, and in the present case, as I have previously stated, full freight was never offered by the plaintiffs, *Tyndall v. Taylor* (4 El. & Bl. 227). The only exception to this rule is, where the master declines either to carry on or to trans-ship—in short, abandons his contract altogether; in that case, the consignee is entitled to his goods without payment of any freight at all. *Hunter v. Prinsep* (10 East, 394).

In the present instance I have already held that the defendant did not decline either to carry on or to trans-ship. Indeed, supposing the defendant to have declined to carry on, the Court could not, without positive evidence of the fact (which is here wanting), conclude that the defendant had declined to trans-

ship, because, looking to his own interest, he would have preferred to trans-ship from Ramsgate to Dunkirk, rather than pay the penalty under British law of forfeiting the whole of his freight. Fourth. British law, like the French law, allows to the master a reasonable time within which he may exercise his option. *Cargo Ex Galam* (3 N. R. 257). And by "reasonable" I think, must be meant that which is reasonable, all circumstances being considered, and amongst these circumstances would be the *vis major* of the decree of a judicial tribunal. *Hadley v. Clarke* (8 Term. Rep. 259). Nor does it make any difference that the tribunal was a French one. Because it is for the British law to determine the rights of the owner of the goods against the master (as, for the purpose of the argument, I am now assuming), that is no reason that the British law should overlook the fact that the relations of the shipowner the master and the underwriters were all governed by French law; and the consequences of that fact, viz., that the master could not abandon or sell the vessel without having obtained a formal certificate of unnavigability, and that if the shipowner intended to insist on abandonment, it was necessary for him to oppose the application of the underwriters. In short, in estimating what is a reasonable delay, the British law would practically take into consideration the same circumstances as the French law would. And I have already held that by the French law, as it appears to me, the plaintiffs are not in a position to complain of the delay, so far as it was occasioned by French litigation.

The claim of the plaintiffs then fails equally, whether tried by French law or by New York law, and I must pronounce against it, with costs.

EQUITY.

Lord Chancellor. } *Re FACTAGE PARISIEN*
11 JAN. 1865. } (Limited).

Winding Up—Company—Change of Management.

Where a petition for winding up a company alleged two grounds for so doing, first, that the business had hitherto been carried on at a loss, secondly, that a recent change in the management had, in reality, changed the nature of the business of the company; but a majority of the shareholders were desirous that the company should go on with its undertaking,—the petition was dismissed without prejudice to any bill which might be filed in order to restrain such proceedings of the company as were ultra vires.

This petition for winding-up, which had been ordered to stand over (*ante*, 5 N. R. 178), was again mentioned.

A meeting of the shareholders had been held, according to the direction of the Lord Chancellor, and a large majority of the shareholders present agreed to a motion expressing confidence in the new management, and a desire that the company should continue to carry on its business.

THE LORD CHANCELLOR said that, under these circumstances, he should not exercise the discretion given him by the Act, *viz.*, to wind up a company when he deemed it was expedient that the same should be wound up.

The petition would be dismissed, without prejudice to any steps which the dissatisfied shareholders might take, by bill or otherwise, to restrain any proceedings of the company, which might be *ultra vires*.

Lord Chancellor. }
9, 10 NOV. 1864, } *GREEN v. GASCOYNE.*
12 JAN. 1865. }

Will, Construction—Trust for Accumulation—Thellusson Act.

The effect of the Thellusson Act is to cut short an accumulation directed by a testator, but not otherwise to alter the will in point of disposition or interpretation.

This was an appeal from a decision of Vice-Chancellor Kindersley, reported 3 N. R. 238.

Henry Gascoyne by his will, dated the 22nd of October, 1832, after directing that his debts and funeral and testamentary expenses should be paid out of the rents of his real estate thereafter devised to trustees, and making certain specific devises and

bequeathing certain annuities (which were charged on the farm next mentioned), devised a certain farm (subject to the annuities), to trustees upon trust during the joint lives of the wife and the sister of the testator, and the life of the survivor of them, to let the same; and he declared that his trustees should stand possessed of the rents, issues, and profits thereof upon the trusts and for the intents and purposes thereafter expressed: and from and immediately after the decease of the survivor of his wife and sister, upon trust to sell the same: and as to the money arising from such sale, and the rents, issues, and profits thereof after the same should become saleable, he gave the same to his trustees upon the trusts therein-after declared with respect to the moneys arising from the sale of the residue of his real and personal estate. He then devised his residuary real estate to trustees, upon trust to let the same until the 6th of April, 1843, and then to sell the same: and directed the moneys to arise from the sale thereof, and the rents, issues, and profits thereof, until the same should be sold, after the same had become saleable, to be held upon the same trusts as thereafter declared concerning his residuary personal estate: and, after making certain specific and pecuniary bequests, gave his personal estate (not thereinbefore disposed of) to trustees upon trust to convert the same into money with all convenient speed after his decease, and to stand possessed of the moneys to arise from such conversion, and also of the moneys to arise from the sale of the various real estates thereinbefore directed to be sold, and also of the rents of his said real estates until the same should be sold, and all the accumulations thereof, and also the rents of the said estates after the same should become saleable, upon the trusts thereafter declared concerning the same, being for the benefit of the children and issue of his brother Jonathan Gascoyne: and it was thereby provided that in the meantime, until his real estate thereinbefore devised to his trustees should be sold and disposed of, his trustees should stand possessed of the rents, issues and profits thereof (subject to the payment of the debts, &c., charged thereon), upon trust to pay the annuities charged thereon, and upon further trust to invest the residue of such rents, issues, and profits, which should not be applied for the purposes thereinbefore mentioned, and also the income arising from such investments, so that the same, and the resulting income and produce thereof, might accumulate by way of compound interest; and when and so soon as the several estates should be sold, or become saleable, then upon trust to stand possessed of the said rents, issues, and profits, and the

accumulations thereof, upon the trusts thereinbefore declared concerning the same, and concerning the money to arise from the sales of the said estates respectively.

Twenty-one years having elapsed since the death of the testator, and his sister being still alive, the question arose, whether the residuary devisees or the heir-at-law of the testator were entitled to the rents directed to be accumulated.

The Vice-Chancellor, having held that the residuary devisees were entitled, the heir-at-law appealed.

Glasse, Q.C., and *Freeman*, for the heir-at-law, contended that the gift of the accumulations was not to take effect until the estates were sold: the period fixed for sale was the death of the survivor of the testator's wife and sister: and, the law having stopped the accumulations at the end of twenty-one years from the testator's death, the intermediate rents were undisposed of. They cited,

Eyre v. Marsden, 2 Keen, 564;

Smith v. Lomas, 4 N. R. 318;

Maddonald v. Bryce, 2 Keen, 276.

Baily, Q.C., and *Shebbeare*, for the residuary devisees, contended that the rents which accrued due after the period of twenty-one years passed to his clients under the words, *rents of his said real estates until the same should be sold*. They referred to

Eyre v. Marsden (loc. cit.);

Barrington v. Liddell, 2 De G. M. & G. 480.

Osborne, Q.C., and *Glaister*, for other parties in the same interest, cited,

Trickey v. Trickey, 3 M. & K. 560;

Gosling v. Gosling, John. 265.

THE LORD CHANCELLOR, without calling for a reply, said, that he would now state his present opinion on the question, and, if counsel should, on consideration, consider it to be erroneous, he would be glad to give an opportunity of having the matter re-argued by one counsel on each side in Hilary Term.

The present case was that of a testator directing an accumulation during the lives of his wife and his sister, and the survivor of them. He would consider, first, the operation of the statute on that trust for accumulation; and, secondly, the effect of the operation of the statute on the construction and interpretation of the will.

Now the first effect of the statute was to limit the trust for accumulation to a period of twenty-one years; and he must, therefore, take the trust as if it had been expressed for a period of twenty-one years, provided the wife and the sister of the testator, or the survivor of them, should so long live.

Secondly, the words of the statute, directing that the rents released from the trust for accumulation by the operation of the statute should go and be received by such person or persons as would have been entitled thereto, if such accumulation had not

been directed, must be construed to mean as if such *excessive* accumulation had not been directed, and, so holding, the meaning of the words was brought to this, as if the accumulation had been directed for twenty-one years. Further, he was not at liberty to use the statute, so as in any manner to accelerate the enjoyment of any gift or disposition contained in the will, or for the purpose of giving to any term or description contained in it a meaning, which it would not have had, if the trust for accumulation were good instead of bad. Although the trust for accumulation was cut down and reduced to a limited period, the rest of the will remained in point of disposition, and in point of the true meaning, effect, and interpretation of its language, as if no such operation had been performed by the statute.

Having made these prefatory observations, he would endeavour briefly to ascertain the effect of the disposition of the will. The testator devised the estate in question to trustees, directing them to let the same during the lives of his wife and his sister, and the life of the survivor of them, and to stand possessed of the rents, issues, and profits thereof, that is, the rents, issues, and profits of the devised lands during the period over which they were directed to let the same, upon the trusts thereafter declared. Then followed a direction to sell the estates at a period marked beyond the possibility of dispute, namely, the death of the survivor of the wife and sister. It was also to be observed, that the testator, in disposing of the proceeds of sale, adverted in clear terms to the rents which would arise between the death of the survivor and the actual sale. There was, therefore, first of all, a trust declared by reference of the aggregate rents and profits during the lives of the wife and sister, and then a trust declared of the proceeds of sale and of the rents after the estate became saleable.

Now the first words which, to a certain extent, answered the trust by reference, were those by which the trustees were directed to stand possessed of the rents of the devised estates *until the same should be sold*, and the accumulations thereof, and also the rents after the estates should become saleable. Those words embraced two classes of rents: the first class being that which was the subject of the subsequent accumulation, and the second, the rents to arise after the estates became saleable. The contention on the part of the respondents was, that the words *the rents of the devised estates until the same should be sold and the accumulations thereof* admitted of a different meaning after the statute was applied, from that which they clearly would have had if there had been no statute to apply. If there had been no statute the words "the rents of the devised estates until the same should be sold" would have been identical with "the accumulations thereof;" not that the latter words would have been mere surplusage, for they would have included not only the rents first spoken of, but the produce in the shape of interest. The words "rent, &c.," how-

ever, could not by possibility apply to anything else than the rents directed to be accumulated; and that being so, how could they be interpreted to include the rents which, by the operation of the statute, were emancipated from accumulation? To interpret the will in this manner, would be to make a new will for the testator, and to give his words a different meaning from that in which he used them.

But the case did not rest there. The clause in question must be construed with reference to the subsequent parts of the will, not only because the subject matter was the same, but also because the rents and accumulations which were spoken of were expressly directed to be held upon the trusts therein-after declared. In the subsequent part of the will was to be found, for the first time, the trust for accumulation *in extenso*, which was directed very much in the ordinary form. But immediately afterwards there came these most material words, *when and so soon as the estates should be sold or become saleable, then upon trust to stand possessed of the said rents, issues, and profits and the accumulations thereof, &c.* By every principle of construction these words must be taken in connection with the immediately preceding trust for accumulation. It therefore followed, that the gift of the subject of accumulation was made by a declaration of trust, and in no other manner; and this trust was declared to arise upon the estates becoming saleable, that is, upon the death of the survivor of the widow and sister. Consequently, the rents accruing due, after the end of twenty-one years, and before the death of the survivor, did not fall within the ambit of that trust, for it did not arise till the death of the survivor. There was, therefore, a hiatus between the period when the accumulations ceased by law, and the period when it was directed to cease; and there was nothing in the will to catch the rents arising during that hiatus, for the only words relied on for that purpose were, as had been shown, simply descriptive of the accumulated fund. The rents during the period in question, therefore, belonged to the heir-at-law.

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The case having been put in the paper to be re-argued, the counsel for the respondents stated, that having nothing to add to their former arguments, they were content that his Lordship's former decision should be adhered to.

A question arose as to the costs. The order as to them was ultimately made according to the following,

Minute.—Declare that the costs of all parties of the hearing before the Vice-Chancellor of the present rehearing, relating to, and occasioned by, the dispute in question between the heir-at-law and the trustees of the will, ought to be separately ascertained and borne by the accumulated rents, and the rents to which the heir-at-law is hereby declared to be entitled proportionally, according to the relative values of the two funds.

Lord Chancellor. } *Re* BUNBURY'S SETTLED
29 DEC. 1864. } ESTATES.
14 JAN. 1865.

*Leases and Sales of Settled Estates Act, s. 20—
Amendment of Petition—New Advertisements.*

When a petition, under the Leases and Sales of Settled Estates Act, is amended after the advertisements have been published, it is in the discretion of the Court to direct new advertisements or not, according as it considers the amended application substantially different from, or substantially the same as, the original one.

In this case a petition, under the Settled Estates Act, had been presented to the Master of the Rolls. In the petition the custom of a manor, under which part of the property was held, was incorrectly stated,—the youngest son, and not the eldest son, as there stated, being the customary heir. The parties who would take in either case were, however, petitioners. The Master of the Rolls allowed the petition to be amended in this respect; and as it was alleged, that before the order could be obtained one of the petitioners would have married, and that on his marriage he proposed, under a power given him by the settlement, to appoint a life estate to his wife, the Master of the Rolls gave leave to amend the petition, by making her and her trustees parties. His Honour doubted, however, whether these amendments would not necessitate fresh advertisements, and desired that the point should be brought before the Lord Chancellor.

Kekewich for the petitioners.

THE LORD CHANCELLOR said, that if every variation in circumstances from those originally stated necessitated new advertisements, great delay and expense would be the result. The object was to make public the property dealt with, and the persons dealing with it. He was inclined to think that, in general, devolutions of interest taking place by act of law pending the proceedings, did not require new advertisements; but that new interests, created by contract or other act of parties, would require them. He would read through the petition, and mention it again on a future day.

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THE LORD CHANCELLOR said, the question here was, whether the amended petition was, in fact, a new petition, or one so altered as to be a distinct application, and, therefore, required fresh advertisements? The Court had a discretionary power to direct such advertisements as were proper. That power continued after amendment, and the fact of the original advertisements might properly be taken into consideration. But in every case, the nature of the particular amendments must be regarded. Where new facts were stated, or new parties introduced, so as to clothe the petition with a new character, the Court would order the advertise-

ments to be repeated. In the present case, there was in the original petition an error, as to the custom of descent; but, as the eldest and youngest sons were both parties, this correction could not call for any fresh advertisement. Again, the exercise of a power of jointuring by one of the petitioners, would make no substantial difference, and there could be no possible danger from omitting to advertise it. Here, therefore, the advertisements need not be repeated. What he decided was, that on an amended petition, it was not as of course to begin *de novo*. Whether this should be done or not, rested in the discretion of the Court.

Lord Chancellor. } *Ex parte* ANON.
14 JAN. 1865.

*Transfer of Land Act, 1862, ss. 17, 134—
Practice.*

*Mode of obtaining the opinion of the Court under the
17th and 134th sections of the 25 & 26 Vict. c. 53.*

In this case a summons in Chambers had been taken out before the Master of the Rolls under the 25 & 26 Vict. c. 53 (*Transfer of Land Act*), ss. 17 & 134, and by him adjourned into Court.

His Honour being in doubt as to the proper course of proceeding in such a case, and there being no respondents before the Court, directed the matter to be mentioned to the Lord Chancellor, and accordingly

Erskine now applied for his Lordship's direction.

THE LORD CHANCELLOR thought that the better way would be that a statement of facts should be prepared, and certified by the Land Registrar to be correct. In the absence of any respondents, the Court must form the best judgment it could, on the facts thus submitted to it.

Lord Chancellor. } *Re* THORP.
14 JAN. 1865. } *Ex parte* THOMAS.

*Statute of Frauds, section 17—Bought Note—
Sold Note not forthcoming.*

A broker contracted with another broker for the purchase of a quantity of oil, to be delivered in four separate parcels, and sent to his principal a bought note, signed by himself, and which contained a provision that each delivery was to stand as a separate contract. Some of the parcels were duly delivered in accordance with the contract:—

Held, that there was sufficient evidence of a binding contract, and that the bought note was a sufficient memorandum of it, under the 17th section of the Statute of Frauds, to charge the buyer.

Messrs. Robert Thorp & Co. carried on business in Liverpool, as seed-crushers and oil-merchants, and in the year 1863, Messrs. Bennett Brothers & Co., duly authorised to act as their brokers, entered into

a contract with Messrs. Thomas & Rough for the purchase of oil, and thereupon they sent the following "bought note" to their principals.

"3, Crosby Square, London,
"24th April, 1863.

"Bought this day for account of Messrs. R. Thorp & Co., of Messrs. Thomas & Rough, forty tons of linseed oil, of good merchantable quality, at 43s. per cwt., good strong iron-bound casks included, delivered to craft or trucks in Hull, free of expense, say ten tons a month, during the months of September to December next, both inclusive.

"Payments to be made by cash, less two and a-half per cent. discount, upon receipt of invoice and delivery; and each delivery to stand as a separate contract.

"Brokerage half per cent. to us.

"BENNETT BROTHERS & Co.,
"Brokers."

Some of the oil was delivered to Messrs. R. Thorp & Co., in accordance with this note, but towards the end of the year 1863 Messrs. R. Thorp & Co. fell into difficulties, and were ultimately adjudicated bankrupts on the 20th of January, 1864. Under these circumstances, Messrs. Thomas & Rough, who were really brokers for undisclosed principals, sold in the market the parcels of oil that should have been delivered in the latter part of 1863, and they claimed to prove against the bankrupts for the difference between the prices thus realised and the prices which the bankrupts ought to have paid. No contract note was proved to have been delivered by Messrs. Bennett Brothers to Messrs. Thomas & Rough or their principals.

Mr. Commissioner Perry rejected the proof, and Messrs. Thomas and Rough now appealed against that decision.

Bacon, Q.C., and Druce, for the appellants.

The note signed by Messrs. Bennett Brothers & Co. is a sufficient compliance with the 17th section of the Statute of Frauds.

Russell, for the assignees.

There is no evidence of a *consensus ad idem placitum* between the appellants and the bankrupts, for the note relied upon is a mere memorandum coming from the custody of the latter, and there is no evidence that it, or any similar note, was communicated to the former. Nor can the delivery of some of the parcels be prayed in aid, as there is a provision in the note that each delivery is to stand as a separate contract,

Haves v. Forster, 1 Moo. & R. 368;

Blackburn on Contract of Sale, 90;

Sieversright v. Archibald, 17 Q. B. 103.

Bacon, Q.C., in reply.

THE LORD CHANCELLOR said, he thought the memorandum was sufficient under the Statute of Frauds, and although it was not delivered to the seller, yet, as the contract was partly carried out by the seller, and assented to by the buyer, the former

would be entitled to have the memorandum produced. There were here two distinct brokers, and the buyer's broker having signed a good memorandum, the party claiming the benefit of the contract would have a right to its production, though in the buyer's possession. The case would go back to the Commissioner with this intimation of his opinion.

Lords Justices. } *PELLEY v. BASCOMBE.*
12 JAN. 1865.

Infant—Statute of Limitations—Adverse Possession.

In this case, which is fully reported in the Court below, 2 N. R. 263, and which does not call for a further report, their Lordships being of opinion that, on the evidence, there had never been any adverse possession, dismissed the appeal without costs.

Lords Justices. } *LAUTOUR v. THE ATTORNEY-GENERAL.*
16, 17 JAN. 1865.

Contract with the Crown—Specific Performance—Costs.

The plaintiff, on the faith of regulations issued by the Colonial Office, spent considerable sums of money in a colony, and in promoting the emigration of various people to that colony, but did not observe the regulations accurately as to the proportion of male and female emigrants. A considerable tract of land was allotted to him in accordance with the regulations, but his claim to a still larger extent was refused by the Colonial Office. On bill filed by permission of the Lord Chancellor, many years subsequently, for the purpose of enforcing his claim:—

Held, on demurrer, per KNIGHT BRUCE, L.J., that the plaintiff was entitled to have the bill answered.

This was an appeal from an order made by Stuart, V.-C., overruling the demurrer of the Attorney-General.

In the year 1828 the British Government issued regulations for the purpose of promoting the colonisation of Western Australia, offering grants of land to those, who should bear the expense of emigrants going to settle there, and of supplying them with necessaries, the emigrants to consist of not less than five females for every six males.

The plaintiff by his bill alleged that in the year 1830 he spent very considerable sums of money in promoting emigration, the emigrants not, however, being in the prescribed ratio as to sexes. He obtained a grant of 113,100 acres from the Government, but asserted that under the regulations he had a right to 445,486 acres in return for the money he had spent. Such claim was refused. And the present bill was filed by permission obtained from the Lord Chancellor on a petition of right presented in the year 1857.

The case is reported *ante*, 5 N. R. 102.

The Attorney-General, and *Wickens*, for the Attorney-General, contended that there was no contract at all on the part of the Crown, because the plaintiff had not satisfied the conditions of the regulations; and he did not, therefore, fill the position of a person with whom the Crown, by the representations made in the regulations, might perhaps be considered as contracting.

They admitted that it was immaterial to their argument whether their case was to be considered as one founded upon contract, or upon the faith given to the representations of the Government, presuming such a distinction to be valid, and contended that the contract, on the assumption that there was one, was not of a nature capable of being specifically enforced by this Court.

Sir Hugh Cairns, Q.C., and *Jessel*, appeared in support of the bill, but were not called upon to argue the case.

KNIGHT BRUCE, L.J., said, that the bill raised considerations of so much delicacy and difficulty that he thought it ought to be answered. He was desirous, however, of expressing no opinion upon the merits of the case, and he should follow the precedent made by Lord Hardwicke in *Brounsword v. Edwardes* (2 Ves. sen. 244,) viz., reserve the benefit of the demurrer to the hearing.

TURNER, L.J., said, that his present impression was, that the demurrer should be allowed, but not having heard the argument against it, he declined to state any reason.

On the question of costs, the case of *The Attorney-General v. Hamer* (4 De G. & J. 205,) was cited, and their Lordships, following that case, directed that the order should expressly state that no costs were given on either side.

Master of the Rolls. } *Re AUSTIN.*
14, 18 JAN. 1865. } *AUSTIN v. AUSTIN.*

Infant—Religious Education—Mother—Guardian.

A child of tender years will not, when the father is dead, be deprived of the care of its mother, unless there are very strong grounds for supposing that the custody of its mother will be antagonistic to the welfare of the child.

The mere fact that the religious belief of the mother differs from that held by the father is not a sufficient ground.

This was a summons to appoint a paternal uncle of an infant to be its guardian, and was opposed by its mother, a Protestant, the uncle being a Roman Catholic.

Mr. Austin, the father of the infant, had married in July, 1861, and died in December, 1862. His widow had in October, 1864, married a Mr. Seager. Mr. Austin

had become a Roman Catholic in 1847, but had not been formally admitted into the Roman Catholic Church until a few days before his marriage. The marriage was celebrated according to both the Roman Catholic and Protestant forms. There was one child of the marriage, a girl, who was born in June, 1862.

No agreement had been made respecting the religious education of the children of the marriage. The child had been baptised in the Roman Catholic Church, one of the female sponsors being a Protestant, the other two sponsors Roman Catholics. In November, 1861, Mr. Austin had instructed his solicitor to draw up his will, and to insert a clause directing his children to be educated as Roman Catholics, and a draft of a will was drawn accordingly, but he never executed the will, and died intestate. This draft contained no appointment of a guardian. It appeared that Mr. Austin during his life permitted his wife at family prayers to use Protestant forms.

Baggallay, Q. C., and Bagshawe, for the summons.

This child must be educated as a Roman Catholic. Independently of the wish of her father, shown by his instructions for his will, the child should be educated in the faith of its father, and the duty so to educate it is paramount to every other consideration. This is the law, and the mother has no right to thwart it,

Davis v. Davis, 10 W. R. 245 ;

Hill v. Hill, 31 L. J. Ch. 505 ; 8 Jur. (N. S.) 609 ;

Stourton v. Stourton, 3 Jur. (N. S.) 527 ;

Re Byng, M. R. 1859 (unreported).

To secure the child being educated as a Roman Catholic, a scheme of its education should be drawn up, and a Roman Catholic guardian appointed. It is important that the religious education of a Roman Catholic child should begin from the earliest age. The child should, therefore, be removed from the custody of its mother, who will educate it as a Protestant, and be placed in the custody of a Roman Catholic. This must be done at once, or we shall be told we are too late, as in *Stourton v. Stourton* (*loc. cit.*). One guardian, at least, ought to be of the father's family, and a Roman Catholic.

Selwyn, Q. C., and E. E. Kay, for the mother.

There was not only no express direction by the father, but he declined to execute his will containing one, and the evidence shows that in his religious faith he halted between two opinions. There is no case where, without an express direction by the father, the Court has peremptorily interfered to educate the child in the faith of its father, and to remove it from the custody of its mother, who is its natural guardian. The child is too young to be taken from her mother.

Baggallay, Q. C., in reply.

18 JAN. 1865.

THE MASTER OF THE ROLLS said, that this was an application by a paternal uncle of the infant, to have himself, or some person other than the mother, ap-

pointed guardian of the infant, on the ground that it ought to be educated in the Roman Catholic faith. In such cases the only thing which the Court considered was, what was most for the benefit of the infant. In the matter of religion the Court held that the Roman Catholic and the Protestant faith were to this extent equally beneficial to the infant, that the infant's hope of eternal salvation depended not on the particular faith which the child professed, but on the manner in which the child might fulfil her duty here on earth. The Court being thus impartial usually gave the preponderance to the wishes of the father, and directed the child to be educated in the father's religion, unless other circumstances made this course undesirable for the child ; for everything was subordinate to the primary object—the welfare of the child ; and as was before remarked, the Court did not consider that the child's future welfare depended on the faith which the child held being either Roman Catholic or Protestant. Now, there was nothing which could enable any person, or combination of persons, to supply the place of a mother, especially where, as in the present case, the child was of tender years. The welfare of the child, therefore, depended so much on its being with the mother that no extent of kindness of other persons could, in fact, supply her place ; indeed, it was frequently said that the death of a mother was an irreparable loss, particularly to very young children. There must, therefore, be very strong circumstances to make the Court take away a child from its mother ; and the Court would only do it when it was essential to the welfare of the child, and when, from the immoral character, of the mother, to be with the mother was worse for the child than to have no mother at all.

In the present case there was no suggestion of anything against the character of the mother ; but the religious education of the child had been the sole ground for the application. The question was, therefore, whether the importance of educating the child as a Roman Catholic, because her father held that faith, was so great as to induce the Court to deprive the child of the care of her mother. His Honour thought it was not ; and that it was impossible, looking to the benefit of the child, that on that ground alone, he could properly take the child away from its mother. His Honour would hesitate to do so in any case, but in the present case he thought that the father himself entertained doubts as to the faith which he professed. If he had not, he probably would have executed his will, as he knew he was ill, and, by the preparation of the draft, had had the subject of the religious education of his children brought to his mind. His Honour would appoint the mother as guardian ; and, as it was usual to add a gentleman, to act with the mother, he would appoint her aunt's husband, one of the gentlemen suggested by her counsel, to be co-guardian. As the child was not yet three years old, he would give no direction at all as to her education

or religious faith, but would leave it for the present to the discretion of her mother. When the child was older his Honour expected to be informed as to the course of education proposed for her, and he might then make any further direction which the character of the child or other circumstances might make desirable. The applicant did not ask for costs; the mother might take hers out of the infant's estate.

Note.—In

Regina v. Clarke (Case of Alicia Race), 7 E. & B. 201, 202,

the Court of Queen's Bench held that, on the death of the father, the mother, as guardian by nurture, succeeded to his parental authority, and refused, in the absence of any prior agreement or direction in his will, to interfere with the mother's discretion as to the faith in which her child was to be educated; see also,

Re O'Malley, 8 Ir. Ch. Rep. 291.

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| <p>Kindersley, V.-C. 9 Dec. 1864. 17 JAN. 1865.</p> | } | <p><i>Ex parte</i> COOPER. <i>Re</i> THE NORTH LONDON RAILWAY COMPANY.</p> |
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Jurisdiction—Lands Clauses Consolidation Act, 1845, s. 76—*Costs*.

Where money has been paid into Court under the 76th section of the Lands Clauses Consolidation Act, 1845, representing the value of an interest greater than the claimant is entitled to, the Court will determine the rights of the parties claiming, and will direct an inquiry in Chambers, to determine the value of the interest substantiated, and order the excess to be repaid to the persons who paid the money into Court.

The sheriff, and a jury, summoned under the Lands Clauses Consolidation Act, 1845, have together power only to assess the value of the interest claimed,—not to determine the extent of interest which ought to be claimed.

The costs of the proceedings, so far as they are occasioned by the determination of the rights of the claimant, are to be borne by him, if he cannot make out his whole claim.

This was a petition by one Cooper and his mortgagees, for the payment out of Court of money, which had been paid in under the 76th section of the Lands Clauses Consolidation Act, 1845.

Cooper had occupied certain premises, which were required by the North London Railway Company. He claimed to hold a portion of the premises, under an indenture of lease, executed in 1859, for the term of twenty-one years, by the executors of the last surviving of the trustees of a will, instead of the heir; which lease was intended to be granted under a power, given by the will to the trustees for the time

being of the will. The consent in writing of the tenant for life, which was a requisite to the granting of the lease, had not been obtained.

The other portions of the premises Cooper claimed to hold, under an indenture of lease, executed in October, 1860, by the same person as in the case of the former lease, and also without the consent in writing of the tenant for life. The latter indenture purported to demise this portion of the premises to Cooper, for the term of eighteen years, at 12*l.* a-year, in consideration of his covenanting to lay out not less than 400*l.* on the improvement of the premises. It appeared that Cooper had laid out a sum exceeding 900*l.*, since October, 1860, upon the improvement of this portion of the premises.

The Railway Company served the usual notice upon Cooper, who sent in to them a claim on account of his supposed interest in the premises as tenant, and also on account of compensation for loss of business. The value of his claim was assessed by a jury, duly summoned under the Act, at 1,500*l.* for his supposed leasehold interest, and 700*l.* for loss of business.

The company having detected the flaws in the title of Cooper, paid the money into the Bank of England, to the credit of the Attorney-General, to the account of Cooper.

Glassey, Q.C., and *Sheffield*, supported the petition.

Fry appeared for all persons interested in the reversion, they having been brought into Court, by being served by the petitioners with the petition.

Rodwell, for the railway company.

17 JAN. 1865.

KINDERSLEY, V.-C., said, that the leases were clearly void at law, and Cooper had no equitable right in respect of them; but it appeared to him that in equity Cooper had an interest in respect of the money laid out; and that the outlay had increased the value of the premises, though not to the full amount claimed. He thought that in equity, whatever was the increase of the pecuniary value of the fee, in consequence of the outlay, to that extent, Cooper was entitled to a portion of the 1,500*l.*, at which the supposed leasehold interest had been valued; Cooper was entitled also to the whole of the 700*l.* assessed, on account of damage.

His Honour had then to determine in what way the equities of the parties were to be worked out. There was no assistance to be derived from authority. It was clearly established, that where in a case like this, a person claimed an interest in premises, which, or part of which, was doubtful, the jury and sheriff together had not the function to determine what that claim ought to be; and rightly so, for if they had, they would be a tribunal for the settlement of all sorts of difficult questions of law, from which tribunal there was no appeal; therefore the matter

had been properly brought before the Court. Under the circumstances of the present case the Court could not pay the whole of the money back to the company. The matter had already been dealt with by a jury, and the Court had no jurisdiction to direct that it should go before a jury a second time. He would direct that so much of the money as Cooper was entitled to, should be paid in accordance with the prayer of the petition, and the rest paid to the company.

He should, accordingly, direct a reference to Chambers to assess what was the value (if any) by which the fee simple of the premises, which purported to be comprised in the indenture of 1860, had been increased by the outlay of Cooper, at the time the premises were required by the company. And he directed that the Attorney-General should pay to Cooper 700*l.*, and so much of the remaining 1,500*l.* as should be certified to be due to the latter.

With respect to the costs, Cooper had brought before the Court, properly no doubt, those persons who were to contest the validity of the leases with him: the costs so occasioned were costs of adverse litigation, and must be borne by Cooper, the other costs by the company.

Note.—See

Brandon v. Brandon, 5 N. R. 214.

Stuart, V.-C. } MOROCCO LAND COMPANY
13, 14 JAN. 1865. } v. FRY.

Lloyd's—Marine Insurance—Unstamped Slip—Agreement—Legal Contract.

The unstamped memorandum or slip, which by the practice of Lloyd's is initialed by the underwriters before granting a policy of marine insurance, is not enforceable in equity as a contract to grant a legal policy.

This was a suit for the specific performance of an alleged contract, on the part of the defendant, to grant a policy of insurance of the plaintiff's vessel for 100*l.*

It is the practice at Lloyd's for a broker who wishes to effect a policy of insurance, to send round a slip of paper, describing the name of the vessel, the proposed voyage, and the terms of insurance. Underneath, the underwriters, or their agents, sign their initials, and set down the sums for which they are willing to insure. This memorandum is called a slip, and is considered so binding in honour that the ship often goes to sea on the faith of it, without waiting for a legal policy to be drawn up. But it is unstamped, and has been decided to be void at law under the Insurance Stamp Act, 35 Geo. 3, c. 63, ss. 11 and 14; and see section 18.

The plaintiffs were a company, trading to the Mediterranean, and, about the beginning of November, 1863,

were sending a ship to Gibraltar, of which the master was one Collingridge, and who was much connected with the company. Collingridge, as their agent, on the 2nd of November, negotiated, through a broker, an insurance of the cargo, and the defendant, by his agent, signed the slip for 100*l.* The ship sailed from Gravesend on the 1st of November, under the charge of Collingridge, who, however, on her arrival in the Downs, on the 3rd, left her to proceed in charge of the mate, contrary to the 136th section of the Merchant Shipping Act, 1854, and she was lost on the 7th, through the misconduct of the mate. The defendant repudiated the insurance on the ground that Collingridge had never intended to go out in the vessel, and had therefore been guilty of misrepresentation; and the plaintiffs, having no contract at law, instituted this suit to enforce the slip as an agreement to grant a legal policy.

Malins, Q.C., and *E. Bury*, for the plaintiff, argued that the slip, though void as a policy of insurance, nevertheless constituted a complete contract to grant a policy. If the defendant had any grounds for disputing his liability, the plaintiffs only asked an opportunity of meeting his objections at law. But he had not; the misconduct or barratry of the master was one of the risks covered by insurance. They cited,

Mead v. Davison, 3 Ad. & E. 303;

Mottens v. Governor and Company of London Assurance, 1 Atk. 544;

Parry v. Great Ship Co., 3 N. R. 79; 10 Jur. (N.S.) 294;

Xenos v. Wickham, 14 C. B. (N.S.) 435, 452;

Arnould on Marine Insurance, 52, 53 (2nd ed.).

Bacon, Q.C., and *Druce*, for the defendant, were not called on.

STUART, V.-C., said that the jurisdiction of the Court was invoked on the principle of specific performance. If any one thing more than another was settled as to the exercise of that jurisdiction, it was that it was discretionary, and that the right to relief in all cases was influenced by the conduct of the parties. In the case before him it was contended that what was called a slip, which was the preliminary step to an insurance, and which was admitted not to be a valid contract at law, should be considered as valid in equity; and the way in which the Court was asked to interfere was by compelling the defendant to execute another instrument which would constitute a valid contract at law. That was an extraordinary demand in reference to one single contract, concerning one subject matter, and he was not aware of any authority for it. It had been urged by the plaintiffs that the Court often decreed the specific performance of contracts to grant leases containing covenants, of which covenants the parties were to have the benefit at law. Those cases were very different from the case of a single contract on a single subject. The object of the lease was to make the land the property of the lessee, and the covenants

were subsidiary to that object. It would be very inconvenient for the Court, in decreeing a lease to be granted, to go into the question of the relief to be given in all the circumstances which might arise, and which the covenants provided for; and therefore it directed the covenants to be inserted, and left them to be worked out at law. What analogy had that procedure to a case in which the very foundation of the relief sought was the non-existence of any contract at law?

In the case before him the agent of the plaintiffs, and master of the vessel, having, on the 2nd of December, made an arrangement by which he was not to take the charge of the ship, but suppressing that fact, induced the defendant on that day, through a broker, to sign the slip, which was a memorandum of the extent to which the defendant was willing to insure the vessel. The suppression of any one material fact which would probably have influenced a contractor in deciding whether to enter into the contract or not, was always a reason for relieving him in Equity from the burden of his contract. Much more was it so when the instrument was at law no agreement at all. These principles were clearly laid down by Lord Redesdale, in *Harnett v. Yeilding* (2 Sch. & Lef. 549, 554).

There were other objections: but one point he noticed because the plaintiff had produced an authority upon it (*Xenos v. Wickham*, *loc. cit.*) which was fatal to his case. Here was an instrument of a very imperfect kind, but recognised by mercantile usage. He was asked to give the plaintiff an opportunity of going to law. The authority cited was to the effect, that the only objection to the instrument at law was the want of a stamp. But when an instrument was only wanting in a stamp, the Legislature gave the same opportunity of stamping it at law as in equity. If there had been no other ground, he should say on that ground, that the plaintiff had failed. The bill would be dismissed with costs.

Stuart, V.-C. } WALFORD v. GRAY.
14 JAN. 1865. }

Promise in consideration of Marriage—Power—Inequitable Appointment.

Property was settled on the marriage of A and B on their children, as A and B, or the survivor of them, should appoint, and in default of appointment, on the children equally, if they survived A and B,—and the issue of any who died earlier, to take their parent's share. A, on the marriage of his daughter, promised in writing that neither he nor his wife would exercise the power, and on the faith of which promise the daughter's share in the fund in default of appointment was settled; but subsequently A and B did execute the power:—

Held, that a child of the daughter's marriage, who was prejudiced by the appointment, was entitled, after her mother's death, to have the appointment set aside,

although her claim was paramount to her mother's settlement.

This was a suit instituted on behalf of the infant daughter of the Rev. Edward Walford, for the purpose of setting aside an appointment by which her grandfather and grandmother, Mr. and Mrs. Gray, had excluded her from any substantial share in her grandmother's fortune.

Mrs. Gray's fortune was settled on her children, as she and her husband or the survivor should appoint, and, in default of appointment, on the children equally, if they survived Mr. and Mrs. Gray: the issue of any, who died earlier, to take their parent's share. There were three children, of whom two survived Mr. and Mrs. Gray, and the third, Mrs. Walford, died before her father, leaving one child, the present plaintiff.

Mr. Gray premised Mr. Walford, in writing, previously to his marriage with Miss Gray in 1847, that his daughter should have "a daughter's portion;" and Mr. Gray's solicitor, in sending proposals for the settlement of Miss Gray's share in her mother's fortune to the professional man who acted for Mr. Walford, after describing the property, and referring to the powers, added:—"These powers, Mr. and Mrs. Gray do not propose to exercise, therefore Miss Gray will become entitled to a third at her parents' death." Some years after Mr. and Mrs. Walford's marriage, family disputes arose; and Mr. and Mrs. Gray executed an appointment of the whole of Mrs. Gray's fortune, except 25*l.*, to her children, to the exclusion of Mrs. Walford. Mr. Gray survived his wife.

The Court was asked, on behalf of the plaintiff, to set aside this appointment, as a violation of Mr. Gray's pledges to Mr. Walford, and so to leave one-third of the property to come to Miss Walford, the plaintiff, under her grandmother's marriage settlement.

Osborne, Q.C., and *E. K. Karlake*, for the plaintiff, cited,

Prole v. Soady, 2 Giff. 1;

West v. Berney, 1 Russ. & M. 431.

F. H. Riddell, for Mr. Walford.

Malins, Q.C., and *G. L. Russell*, for the executors of Mr. Gray, and the persons claiming under the impeached appointment.

STUART, V.-C., said, he had no doubt that there was sufficient documentary evidence to show that the marriage had been contracted on the faith of Mr. Gray's representation that he and his wife would not exercise the power, and to bring the case, therefore, within the well-known authority of *Hammersley v. De Biel* (12 Cl. & Fin. 45). As far, as he knew, however, this was the first case in which a third party, who had in no way acted upon the representations made, had come forward to claim the benefit of a contract based upon those representations. If, therefore, the limitations over contained in Mrs. Gray's settlement, in default of

appointment, had been to a stranger, he should have thought a great deal before he had permitted such a stranger to impeach the appointment. But the issue of the marriage were within the scope of the marriage contract; and as the marriage was contracted on the faith of a representation that the powers should not be exercised, and as the result of not exercising the powers was, that the property went to the issue, the case was relieved from difficulty. The decree must follow the form of the decree in *Davies v. Huguenin* (1 H. & M. 747), and the defendants, except Mr. Walford, must pay the costs of the suit.

Stuart, V.-C. } **GREENFIELD v. EDWARDS.**
16, 17 JAN. 1865.

Injunction—Action at Law—Mortgage—Covenant by Trustee—Fictitious Recitals.

A held an estate as a trustee for B. B, being pressed by a creditor, offered the security of the estate, and a mortgage was executed by A alone to the creditor in the usual form:—

Held, that A was entitled to an injunction to restrain the creditor from suing him upon the covenant contained in the mortgage.

This was a motion for a decree to restrain the defendant Edwards from proceeding with an action at Law upon a covenant contained in a deed, by which the plaintiff had mortgaged an estate, called the Glyn Abbey Estate, to Edwards for 3,400*l*.

The plaintiff was a relation of J. C. Williams, a member of the firm of Goodwin & Co., solicitors, and in 1855 consented, at Williams's request, to take a conveyance of the Glyn Abbey Estate, as a trustee for a client of Williams's. The plaintiff's name only appeared in the conveyance; and as the estate was in mortgage, the conveyance contained a covenant by him with the vendor to pay off the mortgages. From time to time afterwards the plaintiff executed deeds as Williams requested him, without looking into or understanding them.

In 1856, Edwards, who was a creditor of Williams's firm, pressed for payment or security, and Williams agreed to give him a mortgage of the Glyn Abbey Estate. A mortgage for 3,400*l*. was given, in form, from the plaintiff to Edwards, containing a recital that the plaintiff, "having occasion for the sum of 3,400*l*., had applied to and requested Edwards to advance and lend him the same, which Edwards had consented to do," and the usual receipt clause and covenant to pay. There was no proof that the plaintiff knew that the mortgage was given to secure an antecedent debt. Williams subsequently became embarrassed, and left the country, and Edwards sued the plaintiff on his covenant.

Bacon, Q.C., and Cracknell, for the plaintiff, argued that Edwards knew that the recital was false, and that the plaintiff had no consideration for the cove-

nant; that there was no contract of suretyship; and that, if there had been, Edwards had been guilty of such a concealment from the plaintiff of the true relation between himself and Williams, as to disentitle him to charge the plaintiff on Williams's default.

Malins, Q.C., and G. O. Edwards, for Edwards, insisted that the plaintiff could not be relieved by injunction from the effect of a deliberate legal covenant, unless upon proof of fraud or surprise; that the plaintiff knew as well as Edwards that the recital was fictitious; that the plaintiff was bound by the acts of Williams, who was his solicitor; and that Edwards had a right to suppose, from the relations between the plaintiff and Williams, that the plaintiff executed the mortgage with full knowledge of the circumstances.

They cited,

Hamilton v. Watson, 12 Cl. & Fin. 109.

Bacon, Q.C., in reply.

STUART, V.-C., observed that this was a new point. The plaintiff had no estate whatever, except as a trustee. He had had no dealings or transactions in the way of money with the defendant Edwards at all. He was a mere trustee for Williams; and Williams being Edwards's debtor, and Edwards requiring security, and Williams offering the security of this estate, the plaintiff was necessarily a party to the mortgage deed. The deed contained not only a conveyance of the estate by the plaintiff to Edwards, by way of mortgage, with a proviso for redemption and other usual clauses, but Williams and Edwards both agreeing on the form of the security, and both taking as the mortgagor the plaintiff (who was not in Equity entitled to redeem), the deed necessarily contained a statement that Edwards had lent the money to the plaintiff. That was untrue; but it was an essential part of the machinery employed. Again, without a receipt clause, the transaction could not have been carried out. Both Williams and Edwards knew that it was an utter fiction that any money had been received by the plaintiff from Edwards. But as part of the machinery, a recital of borrowing was introduced, and a receipt indorsed, acknowledging the receipt of the money under an obligation to pay it. On the receipt there was, *prima facie*, enough to enable Edwards to recover at Law, but it would be ridiculous to say that he ought to recover either at Law or in Equity. The next obligation of the deed was the covenant to repay, founded on the fictitious receipt. What was the value of that? The covenant was to pay the sum aforesaid; that was, the sum advanced, and there was, in fact, no such sum. If he found an action pending at Law on such a covenant, he had no doubt of the jurisdiction of this Court not to leave the plaintiff to the chances of the result at Law. The whole transaction was fictitious as between the plaintiff

and Edwards; and there was no substance in it, except as a piece of usual machinery, excusable only because in a Court of Equity a trustee was a mere name, and had no estate except for the security of another, and was in Equity so dealt with.

The only forcible argument for the defendant was, that the plaintiff knew as well as the defendant that the recital was untrue; and yet chose to sign the instrument and execute the covenant. The defendant said that, finding it so,—though he made no previous stipulation for the personal security of the plaintiff,—yet finding he had more than he bargained for, he relied on it, and gave time to his debtor; and so had been unfairly dealt by. At first sight the argument seemed strong; but it failed entirely when looked into. When a man made a representation, executed a deed, or did something, in order that another man might act on it, he was bound; but in all those cases the person who relied, relied on a settled arrangement between the parties. Here there were misrepresentations on both sides. The defendant represented that he lent money to the plaintiff—the plaintiff that he had received it. Both parties knew that the meaning was that the usual form of mortgage should be adopted, in order to facilitate the defendant's further dealings with the estate. One representation must be set off against the other.

It had been said, further, that the plaintiff had given the defendant reason to think that he would pay. In order to give a person the benefit of that equity against a covenantor who had received nothing, the covenantor must be fairly dealt by; whereas here, there was not only a fiction, but a substantial misrepresentation as to the debt between Williams and Edwards. The plaintiff had every reason to suppose that that debt arose out of a loan made at the time of the mortgage, whereas the transaction really was a mere shifting of the security for an old debt. Edwards could not enforce representations made to him in a case where he had not told the whole truth. But it had been said that, though the plaintiff had no beneficial interest in the matter, yet Williams was his confidential solicitor; and the plaintiff was misled by his own professional agent. There was no pretence for that. The misrepresentation was made by Edwards as well as by Williams; and the deed did not arise out of matters in which Williams and the plaintiff stood in the relation of solicitor and client.

On the whole, therefore, although it was difficult to relieve any one in a Court of Equity against an obligation deliberately entered into, yet in this case, there must be a perpetual injunction to restrain all proceedings at Law to enforce payment from the plaintiff. It was not a case for costs.

Wood, V.-C.
14 JAN. 1865.

BAILEY v. BERCHALL.
BARNES v. RATCLIFFE.
BAILEY v. RATCLIFFE.

Solicitor's Lien—23 & 24 Vict. c. 127, s. 28.

The lien of a solicitor, upon property preserved in a suit, is not affected by the fact, that when the accounts are taken, it appears that nothing is due to his client.

Joseph Barnes, the testator in the above causes, left by his will an annuity to Mary the wife of John Bailey, for her separate use. Shortly after his death, in 1861, his executors advertised his leasehold property for sale. Proceedings were instituted in the Court of Probate, for the purpose of trying the validity of his will. Whereupon John and Mary Bailey filed the bill in the suit of *Bailey v. Berchall*, praying for a receiver. An order was made in that suit, by consent of all parties, for a receiver, to preserve the property of the testator pending the proceedings in the Probate Court. The validity of the will was established in the Probate Court, and thereupon the bill in the suit of *Barnes v. Ratcliffe* was filed, for the administration of the testator's estate. Soon afterwards, the bill in *Bailey v. Ratcliffe* was filed, for the like purpose. John Bailey was a defendant to the second and third suits. On the 27th of February, 1862, an order was made in the second suit for the administration of the testator's estate, and an order was made in the first and third suits, directing them to be stayed, with a direction that the costs of all parties should be taxed, and paid to them by the executors out of the testator's estate. John Bailey owed the testator a large sum of money, which still remained unpaid. The executors claimed a right to set off such debt against his costs.

This was the petition of the solicitor who acted for John Bailey, and for other persons, in all the three suits, praying that the Court would declare him to be entitled to a charge upon the personal—and also, if necessary, upon the real—estate of the testator, for the costs of John Bailey, and of the other persons for whom he appeared, in the three suits; and that directions might be given for raising and paying such costs, notwithstanding the claims of the executors to defeat such charge.

Roll, Q.C., and *Kay*, for the petitioner, argued:

Where a solicitor has been the instrument of recovering property, and costs have been incurred by him, the Court recognises his right to his costs, a right not to be defeated by his client and therefore, not by any claim for a set-off: they cited,

Ex parte Bryant, 1 Mad. 49,

where the client executed a release of the costs;

Lloyd v. Mason, 4 Hare, 132,

where the solicitor attached the client for non-payment;

White v. Pearce, 7 Hare, 276,

where the client compromised the suit.

It makes no difference that the costs were ordered to be paid to the client himself.

The recent Act, 23 & 24 Vict. c. 127, s. 28, extends the right of the solicitor to cases in which he has *preserved* property.

Willcock, Q.C., and *H. Prendergast*, argued, *contra* :

In all the cases cited, the money belonged to the client. Here the client had actually no interest in the property. And the client's debt must be set off against his costs.

Roll, Q.C., in reply, contended, that, even if the fact of the client having no interest in the property would have defeated the solicitor's lien before the Act, 23 & 24 Vict. c. 127, the case was different now, as the solicitor had *preserved* the property.

WOOD, V.-C., said, that the solicitor must have his lien. Even if the case had been before the Act, still

the Court had actually given the plaintiff his costs. The only reason that costs had not been directed to be paid immediately to the solicitor, was, that the fund was in hand. With regard to the argument as to the set-off, he was of opinion, that where property was preserved for the benefit of all parties, it would not be a just construction of the Act to deprive the solicitor of his lien for costs, merely because when the accounts came to be taken, his client was found to owe something to the estate.

Minute.—A charge on estate for costs of all persons for whom petitioner acted as solicitor, and without set-off in respect of John Bailey's debt; and let costs be paid accordingly. No costs to petitioner: costs of respondents (the executors) to be costs in the cause.

COMMON LAW.

Q. B. } BOULTER v. WEBSTER.
14 JAN. 1865. }

9 & 10 Vict. c. 93—*Medical Expenses—
Pecuniary Damage.*

The expenses of nursing, and medical attendance, are not recoverable in, and are not sufficient to, support an action under 9 & 10 Vict. c. 93 (Lord Campbell's Act).

An action is not maintainable under this Act without proof of pecuniary damage. Duckworth v. Johnson followed.

In an action, brought under 9 & 10 Vict. c. 93, by the father as administrator of a child run over and killed by the negligence of the defendant, the jury found specially that the plaintiff had sustained no money damage, and that the expenses for the funeral were 5*l.*, and for the nursing and medical attendance were 2*l.* The Judge thereupon directed a verdict for the defendant, with leave to the plaintiff to move.

Henry James, accordingly, now moved to enter a verdict for the plaintiff or for a new trial. I admit the funeral expenses are not recoverable,

Dalton v. South-Eastern Railway Company, 27

L. J. C. P. 227, 4 C. B. (N. S.) 296.

But there is no authority as to medical expenses, and I say they are sufficient to support the action under the Act.

[COCKBURN, C.J.—The principle is the same as in the case of funeral expenses.]

Next, this action is maintainable without any money damage. This is equivalent to a verdict with nominal damages.

[BLACKBURN, J.—That is only where the law implies damage.]

[CROMPTON, J.—It has been held that the action will not lie where there is no pecuniary damage, *Duckworth v. Johnson* (29 L. J. Ex. 25, 4 H. & N. 653).]

Rule refused.

Q. B. } ROBERTS v. EVANS.
16 JAN. 1865. }

*Reference to Arbitration—Enlargement of Time
—Rule of Court—Affidavit of Arbitrator's
Handwriting—Existing Practice.*

Upon an order of reference appeared two indorsements enlarging the time for making the award, which indorsements purported to be made within the proper time respectively, and to be signed by the arbitrator. For making the order and enlargements a rule of Court, an affidavit verifying the arbitrator's handwriting, but not stating that the enlargements were in fact made within the proper time, was held sufficient.

In this cause all matters had been referred by a Judge's order to an arbitrator, with power to make his award on the 11th of January, 1864, or such ulterior day as he might appoint by writing. The award was made on the 5th of February. On the order of reference appeared two regular indorsements purporting to be signed by the arbitrator. The first, dated the 9th of January, extended the time till the 1st of February; the second, dated the 1st of February, extended the time till the 1st of March. The order with the enlargements was made a rule of Court by the defendant upon an affidavit verifying

the arbitrator's handwriting of the above. A rule nisi was then obtained to discharge this rule of Court upon an affidavit by the plaintiff's attorney that the second enlargement, though purporting to be made on the 1st of February, was not really made till the 5th of February. The arbitrator having refused to make any affidavit as to the fact, it was peremptorily ordered by this Court (*Roberts v. Evans*, 34 L. J. Q. B. 7), that the arbitrator should be examined on oath before the Master, and the arbitrator then swore that the enlargements were made in due time. Against the rule nisi

Mellish, Q.C., and Robins, now showed cause.

The verifying affidavit was sufficient, and no other was needed. The enlargements must be taken to have been made when they purport to be made,

Dickins v. Jarvis, 5 B. & C. 528;

In re Smith and Reeves, 5 Dowl. 513.

[COCKBURN, C.J.—The Master says that here and in the Exchequer, only an affidavit such as this has been required since 17 & 18 Vict. c. 125.]

Borill, Q.C., and Shaw, in support.

There should have been an affidavit that the enlargements were, in fact, made in time,

2 Chit. Arch. Pr. 1631 (11th ed.).

COCKBURN, C.J.—I think the rule should be discharged. It appears that, according to the practice since 17 & 18 Vict. c. 125, the affidavit of an attesting witness has not been required to establish the fact that an enlargement of the time purporting to be made within the proper time was so made. We could not, therefore, expect such an affidavit here. We must deal now in accordance with the existing practice, and give credit to the arbitrator's statement as appearing on the order of reference. In all cases it might be more satisfactory to have an affidavit either from the arbitrator or the attesting witness, if there be one, that the enlargement was made within the proper time. But as the practice now is, this rule must be discharged.

CROMPTON, J.—I am of the same opinion. I think it undesirable to make any alteration in the practice which now prevails in two out of the three Courts, to receive an affidavit of this kind as satisfactory.

BLACKBURN and MELLOR, JJ., concurred.

Rule discharged.

C. P. } STEELE, Appellant, v. BOSWORTH,
18 Nov. 1864. } Respondent.

REGISTRATION APPEAL

County Vote—2 Will. 4, c. 45, s. 18—Charity
—Occupiers of a Hospital.

In 1692 the Bottesford Hospital was founded for the support of twelve poor men; in 1762, the lands were reconveyed to trustees in trust, to allow the rectors of

two rectories to receive the rents and profits for the purpose of distributing among the inmates of the hospital certain sums of money (less than 10*l.* per annum), and certain necessaries at stated times, and for the purpose of repairing the hospital: it was in the deed directed that two other poor men should be added to the original number.

No mention is made in the deed of how the surplus is to be disposed of, and it has been distributed among the inmates. The claimant is in receipt of more than 10*l.* per annum. The inmates are removable for immorality, but no inmate has ever been removed. Each of the inmates occupies separate rooms:—

Held; that the claimant had neither a legal nor equitable interest in the lands, and that he was not entitled to vote for the county.

This was an appeal from the decision of the revising-barrister for the northern division of the county of Leicester.

“At a court held at Bottesford, J. A. Bosworth duly objected to the name of George Steele being retained on the list of voters for the parish of Bottesford. The name stood on the register as follows:—

| Steele, George. | Bottesford. | Freehold interest in land. | Hospital land. |
|-----------------|-------------|----------------------------|----------------|
|-----------------|-------------|----------------------------|----------------|

“It was proved in evidence that George Steele was an inmate of Bottesford Hospital for men, in the same parish, founded by the Duke of Rutland, in or about the year 1692, which was from time to time augmented until the year 1762, when certain lands and tenements in Bottesford, Muston, Ab-Kettleby, Holwell, and Long Clowson, were reconveyed to certain trustees therein-named, and which conveyance after reciting that the rents of premises comprised in certain indentures therein recited had for some time been found sufficient for the support of fourteen poor people, and the said duke, being desirous to extend the said charity to the maintenance of two other poor persons, had directed two more to be added to the twelve poor people already provided for out of the revenues of the said hospital, declared, that the said trustees should stand possessed of the said lands and tenements upon the following trusts; that is to say, in trust that they the said trustees, and the survivor and survivors of them, should permit and suffer the rector of the rectories of Bottesford and Harley respectively for ever, to receive and take the rents and profits of all and singular the said messuages, lands, and premises thereby respectively granted, bargained, and sold, as often as the same should become due and payable; to the intent and purpose that they the said rectors and their successors, or the rector for the time being of Bottesford and Harley aforesaid respectively for ever, should and would, by and out of the said rents and profits, pay and distribute to the fourteen poor men who then were or thereafter should be legally and rightly admitted into and placed in the said hospital; that is

to say, to each and every of them once in every month the sum of 10s. 8d. of current British money, and also the sum of 6d. to each and every of the said poor men at four several times in the year; namely, Easter, Whitsuntide, Bottesford feast, and Christmas, for pye money, and also the sum of 10d. to each and every poor man in December every year, for and in lieu of capon money, and also in February and August yearly to every of the said poor men 6d. a time for buying them salt. And also to every of them the said poor men the sum of 10d. in September yearly for the finding them with candles. And also the sum of 1s. 6d. every month for the fire-maker for the making each of the said poor men fires; and also the sum of 30s. for each and every of the said poor men in April yearly for the providing every of them a suit of clothes, and to each and every of them a good cloth gown and making at Easter every second year. And also the sum of 6s. 8d. a man to the laundress for washing for each poor man at Lady-day and Michaelmas yearly, by even and equal portions. And also out of the said rents to find and provide for each of the said poor men twenty hundredweight of hard coals, to be laid in yearly in the month of May; and also then and from time to time, and at all times thereafter, to find and provide all necessary and reasonable beds and bedding, household goods and other necessary utensils for the use and benefit of the said poor men, but at the discretion of the said trustees parties to these presents; and should maintain, repair, and keep the said hospital or almshouse with all necessary amendments and reparations, and also provide physic and attendance for the sick; and in case the said trustees, or their successors, or the rector for the time being of Bottesford and Harley aforesaid, should neglect or refuse to act or concern themselves in the said trust pursuant to and to be guided by the directions aforesaid, then and in such case it was thereby declared and agreed by and between all the said parties to these presents, and the said John, Duke of Rutland (party thereto), did authorise and empower the said trustees, or any three of them, by any writing under their hands respectively, and also any subsequent grant of the said premises, to nominate and appoint three or more honest and discreet persons to act and be concerned in the said trust, in such manner as the rectors aforesaid or any of them might or were to do by virtue of these presents and of the powers aforesaid. And it was thereby declared and agreed by and between all the said parties to these presents, and the said John, Duke of Rutland (party thereto), did declare that the sole power of nominating and appointing for any person or persons to be placed and admitted in the said hospital, should be and remain in the said present duke (party thereto) and his heirs male for ever, and in case of failure of such heirs male, then the lord or lords of the manor of Bottesford at the time of such failure, and their successors, lord or lords, for the time being,

then shall have the right of nomination and placing of poor persons in such manner as the said duke then had, and his heirs might have; and it was further declared that, in case any of the said poor men, after such their nomination into the said hospital, should in any way abuse the said charity by their immoralities, profaneness, or lewdness, or other misbehaviour, then it should and might be lawful for, and be in the power of the said then present duke (party thereto), or his heirs, or for failure of such for the lords of Bottesford and their successors, or lords of Bottesford for the time being, to remove and displace such person or persons, so as he or they should not have the benefit or advantage of the said charity, and to nominate and appoint any other person or persons in the place and stead of such person or persons so to be removed. And in the said conveyance is contained a declaration that the said trustees should demise or lease all or any part of the said premises for a term not exceeding twenty-one years, so as upon every such lease there be reserved the full and improved rent, without any fine to be paid.

"It was further proved that the said George Steele was paid by the trustees of the hospital the sum of 9s. 2d. per week. That the appointment of the hospital men by the Duke of Rutland for the time being was by word of mouth, or by letter to his agent, who reduced such appointment into writing and forwarded it to the parties so appointed. That there was in the said hospital a common hall where the hospital men had their meals. That each man occupied a separate room with a pantry, and that all the apartments were numbered.

"That the entrance to the said hospital is by one outer door into a passage, at the end of which is a second door, and all the inner doors of the said apartments open into the said passage. That a matron is appointed by the said trustees, who has apartments allotted to her, and who receives a salary of 20l. per annum, and whose duties consist in the general superintendence of the hospital, in cleaning the apartments, and in cooking and washing for the said hospital men.

"That the said hospital men pay no rates or taxes, and never repair the apartments. That they enjoy the use of an orchard and garden adjoining the hospital, and are supplied from the funds of the trust with coal, medicine, medical attendance, and all necessaries (except meat and provisions). They also receive a cloak apiece once in two years. That they have uninterrupted enjoyment of their apartments, together with a key, and with a power of ingress and egress at any time; but that after nine o'clock the matron, by arrangement among the hospital men, locks the outer door and hangs the key in the passage. That no instance has been known of any one of the hospital men being removed, although a power of amotion is contained in the deed for immorality, profaneness, lewdness, or other misbehaviour; nor has any instance been

known of the poor men having ever sublet their apartments.

"That as the rents of the said lands and tenements mentioned in the said deed of re-conveyance increased, such increased rents were distributed among the hospital men from time to time, and so far back as the year 1778, each man has been in receipt of upwards of 10*l.* per annum, and each man is now in actual receipt of 9*s.* 2*d.* per week, exclusive of the coals and gown.

"Upon proof of the above facts, the revising-barrister held :—

"1st. That although the weekly payments to each of the hospital men amounted to more than 10*l.* a-year, as the power of appointment and amotion expressed on the deed appeared to him to be discretionary with the Duke of Rutland for the time being, that the said George Steele has not such an equitable freehold interest in land as to entitle him under the provisions of 2 Will. 4, c. 45, s. 18, to have his name retained upon the register of voters for the said parish of Bottesford, in the said division of the said county.

"2nd. That even if that were not so, the said George Steele was simply a member of an eleemosynary institution, and as such was not entitled to have his name retained upon the said register.

"There were three other names upon the existing register for the said parish, and two on the list of new claimants, whose right to be retained or otherwise depends upon the decision of the Court in the case of the said George Steele. The revising-barrister expunged the names of the said thirteen persons on the old register, and disallowed the said two new claims.

"If the Court should be of opinion that the revising-barrister was wrong, then the name of the said George Steele, together with the names of the thirteen other persons were to be restored to the register, and the two new claims are to be allowed.

"(Signed) &c."

Mellish, Q.C., for the appellant.

The inmates have an equitable life estate in the lands of sufficient value to entitle them to a vote. They can only be removed for misconduct, the motive of the grantor in making the gift cannot be taken into consideration. He cited,

Davis v. Waddington, 7 M. & G. 37 ;

Simpson v. Wilkinson, 7 M. & G. 50 ;

Heartley v. Banks, 5 C. B. (N. s.) 40 ;

Freeman v. Gainsford, 11 C. B. (N. s.) 68.

Hayes, Serjt., said, the payments under the deeds are less than 10*l.* The inmates have a right only to receive a money payment,

Simpson v. Wilkinson (*suprà*) ;

Ashmore v. Lees, 2 C. B. 31.

Mellish, Q.C., in reply, cited,

Attorney-General v. The Drapers' Company, 2 Beav. 508.

The surplus fund belongs to the charity, unless a different intention appears in the deed.

ERLE, C.J.—I am of opinion that the barrister was right in this case. It appears that the hospital was founded in 1692, and in 1762 the lands of the hospital were reconveyed to trustees, who were to hold them in trust to allow the rectors of two parishes to receive the rents and profits, and expend them in the way specified in the deed. The legal estate is, therefore, vested in the trustees, in trust to allow the rectors to expend them in the way specified in the deed. I can see no intention in the deed as to how the surplus is to be expended, there is clearly no appropriation to the inmates of the hospital. The claim is for a freehold interest in land, but none of the inmates have an equitable estate in the lands, they have a right only to certain payments out of the land. They could not file a bill in Equity by which they could gain the equitable freehold estate, they could only enforce the payment of certain money payments. In *Freeman v. Gainsford*, which was a claim for a county vote in respect of the interest in rooms in a hospital as member of the hospital, the judgment was, that the inmates had neither a legal or an equitable interest in the rooms, and, in my judgment, in that case, I said, "that the claimant was appointed as a mere object of charity, having no estate which he could enforce by bill in Equity," and it is an estate of freehold that the claimant must be in possession of. And Williams, J., in the same case said, "that the claimants there occupy their rooms as part of the benefits which they derive from the charitable institution, and that they enjoy them as such, and not as their own, unless they have been expressly granted to them, and that they may be removed from room to room." It is perfectly clear that, although the claimant has the right to ask for the payment of money, yet he has no equitable estate in the lands themselves.

BYLES, J.—I am of the same opinion. The claimant, to be entitled to a vote, must be seised of an estate of freehold ; and it is sufficient if he is possessed of the equitable estate. There is not in this case a simple magisterial trust to receive the money for the *cestui-que-trust*, but the trustees are to give the proceeds among the inmates of the hospital in a particular manner. It is conceded by Mr. Mellish that he must avail himself of the surplus to make the sums sufficient to entitle the inmates to vote. The judgment in *Ashmore v. Lees*, and the judgment of my Lord, and my Brother Williams, in *Freeman v. Gainsford*, support my opinion.

KEATING, J.—I am of the same opinion ; the inmates have an equitable right to certain money payments, but they are not seised of any estate of freehold.

Judgment for the respondent.

C. P. } BLAIN, Appellant v. THE
18 Nov. 1864. } OVERSEERS OF PILKINGTON, Respondents.

REGISTRATION APPEAL.

As to the power of a Revising-barrister to Rehear a Case decided by his Colleague—6 Vict. c. 18, ss. 29, 40, 41.

When there are two barristers for one list, if one of them disposes of a case:—

Held, that the other has not power to rehear the case on a following day, in the absence of one of the parties.

This was an appeal from the decision of one of the revising-barristers for the southern division of Lancashire.

"At a court held by adjournment in Bury, on the 13th of October, 1864, the incumbent of Stand, in the township of Pilkington, applied to have his name restored on the list for that township. His name had been removed from the register in due course of proceeding by the colleague of the revising-barrister for the same division of the county at a previous sitting of the Court, in Bury, in consequence of its having been duly objected to, and of the absence of the applicant or any one on his behalf, when the name in its order was called. At the time in question the applicant had been in attendance on the bishop in performance of his duties as a rural dean of Bury, but with due precaution he had provided a fit and proper person to attend the revising-barrister's court on his behalf, and support his right to remain on the register.

"Upon the application being made, objection was taken that the revising-barrister had no power to entertain it. The revising-barrister was of opinion, first, that though the list in question had been gone through, and duly initialed and signed, yet, as it was still in his power to do in open court all things proper for perfecting the list, in accordance with the intention and purpose of the statutes in that case provided, still remained. Secondly, that the marks of erasure upon the name and qualifications of the applicants in the list accompanied by the initials in the margin were to him sufficient evidence that a valid notice of objection in this particular instance had been duly proved in open court, and that it was competent for him without further proof of such notice to investigate the rights of the applicant to be upon the register. Thirdly, that such investigation, after being initialed by such notice is a proceeding in the hands of the revising-barrister solely, and is not invalidated by the absence of the objector or his agent, or, if present, by any refusal on their part to assist.

"Being further of opinion that the applicant, through no default in him, had been removed from the register, he did, in the exercise of his discretion, entertain the

application, and, upon investigation of the right, being satisfied that he was entitled to be on the register, he restored his name.

"If the Court should be of opinion that the revising-barrister had power to do so, the name is to remain on the register, but if otherwise, it is to be erased."

Keane, Q.C., for the appellant.

By 6 Vict. c. 18, s. 41, the revising-barrister has power to adjourn his Court; and every such barrister shall, upon the hearing in open Court, finally determine upon the validity of such claims and objections, and the barrister shall, in open Court, write his initials against the name expunged or inserted, and shall sign his name at the bottom of every page of the lists. When this has been done, his jurisdiction ceases. The other barrister has constituted himself a court of appeal. The 40th section gives the barrister no right to correct such an error in the list.

No counsel appeared for the respondents.

ERLE, C.J.—The revising-barrister was wrong in this case. The question raised between the objector and voter was the trial of a matter *in foro contentioso*; the case was heard in the Court; no objection was raised by the voter, and the colleague of the revising-barrister disposed of the case in favour of the objector. On the following day, the voter proved that his absence was unavoidable, and was a justifiable absence between man and man: the objector was not present, and the revising-barrister gave judgment on that occasion in favour of the voter. As the objector was not present on that occasion, he was not bound by the decision. If it had been merely the correction of a clerical error, the revising-barrister would have had power to correct it; but there is a great distinction to be made between reconsidering a claim after it has been determined, and the power of correcting a clerical error. If there are two revising-barristers for one list; if the one takes a case and decides it, the other cannot reopen the case. As the objector was not present on the second occasion, the judgment of the first revising-barrister is binding.

BYLES and KEATING, JJ., concurred.

Judgment for the appellant.

C. P. }
11 JAN. 1865. } *Re COOPER.*

Acknowledgment of Deed by Married Woman—3 & 4 Will. 4, c. 74—Affidavit before Public Notary Abroad—Rule of Hil. T. 14 Geo. 3.

An affidavit verifying the acknowledgment of a deed by a married woman, taken by special commissioners in Wisconsin, under 3 & 4 Will. 4, c. 74, is sufficient if sworn before a notary public, certified by the Secretary of State in Wisconsin to have authority to admi-

nister oaths in that State, as in substance complying with rule Hil. T. 14 Geo. 3, as to common recoveries, which required the affidavit to be sworn "before some magistrate of the place where such acknowledgment is taken, having authority to administer an oath."

A commission had been directed to certain special commissioners in Wisconsin, in America, for the purpose of taking the acknowledgment of a married woman of a deed disposing of her interest in certain property under the statute 3 & 4 Will. 4, c. 74, s. 83.

The officer had objected to enrol the documents, on the ground that the affidavit verifying the acknowledgment was sworn before a notary public, instead of a magistrate, in Wisconsin. There was, however, a certificate by the Secretary of State in Wisconsin, certifying that the said notary was qualified to administer oaths in that State.

The statute 3 & 4 Will. 4, c. 74, s. 85, only requires an "affidavit by some person verifying the same." The rules of Court of Hil. T. 1834, are confined to acknowledgments taken in this country. The officer, therefore, fell back on the rule of Hil. T. 14 Geo. 3, which provided, as to common recoveries, "that if the party or parties shall be in Ireland, or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorised to take affidavits in this Court, or before some magistrates of the place where such acknowledgment shall be taken having authority to administer an oath, and in the presence of a public notary, which notary shall also certify in writing under his hand and seal as well the due administering of this oath as also the name, signature, and office of the magistrate administering the same."

Macleod now moved for a rule to direct the officer to enrol the documents.

ERLE, C.J.—You are entitled to have the acknowledgment enrolled. The rule 14 Geo. 3, requires the affidavit to be sworn before a magistrate of the place where such acknowledgment is taken, having authority to administer an oath. It is certified here under the hand and seal of the Secretary of State in Wisconsin, that this notary public had authority to administer an oath. The word "magistrate" here means "officer." The essence of the rule is, that the affidavit should be sworn before some person officially having authority to administer an oath. We have besides the authority of two cases, *Ex parte Mann* (7 Scott, 142), *Ex parte Hutchinson* (5 C. B. 499).

WILLIAMS, KEATING, and WILLES, JJ., concurred.
Rule granted.

C. P. } SMITH, Appellant v. FORE-
12 JAN. 1865. } MAN, Respondent.

REGISTRATION APPEAL.

County Franchise—Requisite Value—Adding together Joint and Separate Holdings—2 Will. 4, c. 45, s. 20; 6 & 7 Vict. c. 18, s. 73.

A rented and occupied solely during the requisite period premises of the value of 40l., and also of the same landlord, jointly with his father, other premises of the value of 64l. :—

Held, that A was not entitled to a vote either under 2 Will. 4, c. 45, s. 20, or under 6 & 7 Vict. c. 18, s. 73, and that the respective values of the joint and separate holdings could not be added together to make up the requisite amount of 50l.

This was an appeal from a decision of the revising barrister for Kent, to raise the question whether the claimant was entitled to a county vote under the following circumstances:—The claimant rented and occupied solely during the requisite period, premises of the yearly value of 40l. He also rented and occupied of the same landlord, jointly with his father, other premises of the yearly value of 64l.

The Reform Act, 2 Will. 4, c. 45, s. 20, enacts, that "every male person of full age, and not subject to any legal incapacity, who shall occupy as tenant any lands or tenements for which he shall be *bond fide* liable to a yearly rent of not less than 50l., shall be entitled to vote in the election of a knight or knights of the shire, &c."

The Registration Act, 6 & 7 Vict. c. 18, s. 73, enacts, that "where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint occupiers shall be entitled to be registered and vote in such election . . . in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be *bond fide* liable in respect of such lands and tenements, shall be of an amount which, when divided by the number of such occupiers, shall give a *bond fide* rent of not less than 50l. for each and every such occupier, but not otherwise."

It was objected that the claimant had no right to a vote under either of these Acts, and that he could not add together the separate holding of 40l. and the joint holding of 32l., so as to make the requisite amount of 50l.

The revising barrister allowed the vote, subject to the present appeal.

Hon. R. Bourke, for the appellant cited,
Gadsby v. Barrow, 1 Lut. R. C. 142.

Hannen, for the respondent.

In *Gadsby v. Barrow*, the holdings were of different landlords. It is submitted, that two separate holdings, under the same landlord, may be tacked toge-

ther, though the point has never been decided. "A rent" does not mean "one single rent,"

Regina v. St. Pancras, 1 Ad. & E. 80.

[ERLE, C.J.—There is a distinction between qualification for rating purposes, and qualification for voting purposes. In the latter case, premises of 50*l.* value, being held of *one* landlord, would be a voucher for the respectability of the claimant.]

True. And that voucher we have here. And if two single holdings under the same landlord can be added, then, on the same principle, a joint and a single holding under the same landlord can be added. "Not otherwise" means "unless the interest amounts to 50*l.*"

The Registration Act was intended to extend the franchise.

Hon. R. Bourke, was not heard in reply.

ERLE, C.J.—I am of opinion that the revising barrister was wrong. The claimant rented, and occupied solely, premises of the yearly value of 40*l.* only. So that he cannot qualify without the Registration Act, which was passed to provide a qualification for persons occupying jointly. Then the words in the Registration Act are precisely limited, and I cannot say, that a qualification arises out of them which is not within the express words of the enactment. [His Lordship read the 73rd section.] The claimant rents and occupies a tenement jointly with his father, for which they are together liable to the amount of 64*l.*, which is too little. The words do not authorise the joining of the two holdings. I do not attempt to fathom the intention of the Legislature, further than the clear words of the enactment guide me. These are two separate Acts, and the claimant is not entitled under either of them.

WILLIAMS, J.—I am quite of the same opinion. It is impossible to come to any other conclusion, if we give any ordinary construction to the words.

KEATING, J.—I am of the same opinion. Without the 73rd section of the Registration Act, a joint occupation would not have qualified or helped to do so.

Judgment for the appellant.

C. P. } COX v. BOEKET.
13 JAN. 1865.

Practice—Compelling Attorney to Disclose Plaintiff's Residence—Intent to Execute Attachment against the Plaintiff—15 & 16 Vict. c. 76, s. 7.

It is no objection to an order on a plaintiff's attorney to disclose his client's address, that the defendant wants the information for the purpose of executing against him an attachment for a debt.

This was a motion on the part of the plaintiff to rescind an order made by Willes, J., under 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852), s. 7,

requiring the plaintiff's attorney to declare the place of abode of his client. The defendant had obtained an attachment against the plaintiff for costs in Chancery; and it was alleged by the latter, and not denied, that the defendant sought the information for the purpose of executing that attachment.

Keane, Q.C., in support of the motion, cited,

Harris v. Holler, 19 L. J. Q. B. 62.

[WILLES, J.—There the address of the party was wanted for the purpose of prosecuting criminal proceedings against her. Here the object is an attachment for payment of a debt.]

[WILLIAMS, J.—As a general principle a party may exercise a right given him by statute, without inquiry into his motives for so doing. The question is often raised, and it is so held at Chambers.]

What is true with regard to criminal proceedings is *a fortiori* true here. The attachment is entirely collateral to this action.

He also referred to,

Pearson v. Turner, 16 C. B. (N. S.) 157; 33 L. J. C. P. 224;

2 Will. 4, c. 39 (Uniformity of Process Act), s. 17.

ERLE, C.J.—There must be no rule. The party has a right to have this information about his opponent; and it cannot be an objection that he has already a claim for costs.

WILLIAMS, J., concurred.

WILLES, J.—It does not follow from our decision that Mr. Justice Patteson was wrong in *Harris v. Holler*. As at present advised, I think he was right.

KEATING, J., concurred.

Rule refused.

C. P. } FLATCHER v. BOODLE.
13, 14 JAN. 1865.

REGISTRATION APPEAL

Borough Franchise—Payment of Rates—Proportionate Payment by Incoming Tenant—17 Geo. 2, c. 38, s. 12—2 Will. 4, c. 45, s. 27.

*A, who claimed to be registered as a 10*l.* householder for a borough, entered on his occupation before the 1st of August, 1863. The rates were made half-yearly, so that the rate made in April, 1863, extended to the following September. The out-going tenant left part of this rate unpaid, and A did not pay it, though he paid the subsequent rate: but it was not demanded of him, nor was his name inserted in the rate. By 17 Geo. 2, c. 38, s. 12, the incoming tenant is made liable to pay a proportionate part of such rate; and by 2 Will. 4, c. 45, s. 27, the franchise is made conditional on the payment by the claimant of all rates payable from him in respect of the premises for which he claims:—*

Held (dissentiente, WILLIAMS, J.), that the propor-

tionale part of the rate of April, 1863, was not payable from the claimant within the 27th section of the Reform Act, as he had no notice to pay from the parish officers.

This was an appeal from a decision of the revising-barrister for the borough of Cheltenham, who stated the following case :—

"The appellant objected to the name of James Burrington being retained on the list of voters, on the ground that part of the poor-rate for the qualifying year had not been paid.

"It was proved that the poor-rates for the parish in which the qualifying premises are situate are made half-yearly : that there was one made in April, 1863, which extended to the following September, when another was made, which extended to March, 1864, in which month the new rate was made, which is the existing rate. The claimant went into the occupation of the qualifying premises before the 1st of August, 1863, but paid no part of the rate then in existence, which was not demanded of him, neither was his name inserted in the rate. It was contended against the vote, that, inasmuch as the 27th section of 2 Will. 4, c. 45, required payment of all rates payable from the voter, he should have gone to the overseers and paid his proportion of the rate of April, 1863, to which he was rendered liable by 17 Geo. 2, c. 38, s. 12; and if any dispute had arisen as to the amount, that it might have been settled by two Justices in the manner provided by that section; and that such omission on the part of the claimant was not remedied by the Registration Act, as the 75th section of that Act only applied to a misnomer, or an inaccurate or insufficient description.

"It appeared to me that, as the Act of George the Second did not say that the incoming tenant should pay, but only that he should be liable to pay, and as the proportion which he was so liable to pay must, before he can so pay it, be first ascertained, either by agreement between the parties, or in case of dispute by the decision of two Justices; and as by 6 Vict. c. 18, s. 75, a person in other respects qualified shall be considered as having paid all rates when he shall have *bond fide* paid all sums of money which he shall have been called upon to pay as rates; therefore an unascertained proportion, which the claimant had never been called upon to pay, was not such a rate as had become payable from him in respect of the qualifying premises within the 27th section of 2 Will. 4, c. 45; and therefore I retained the name on the register.

"If the Court shall be of opinion that I was wrong, then the name of James Burrington is to be expunged."

17 Geo. 2, c. 38, s. 12, recites that "persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses or tenements part

of the year, by reason whereof great sums are annually lost to such parishes and places;" and enacts, "that where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by any two or more of his Majesty's Justices of the Peace."

2 Will. 4, c. 45 (the Reform Act), s. 27, confers the borough franchise on occupiers of houses, &c., of the annual value of 10*l.* if duly registered, "provided that no such person shall be so registered in any year . . . unless such person shall have paid, on or before the 20th day of July in such year, all the poor-rates and assessed taxes which shall have become payable from him in respect of such premises previously to the 6th day of April then next preceding."

6 Vict. c. 18 (the Registration Act), s. 75, after reciting the provisions in the Reform Act with respect to rating, and that doubts had arisen as to the right to be registered where there was a misnomer, or an inaccurate or insufficient description in the rate, enacts that where a person occupies for twelve months before the 31st of July, and, "being the person liable to be rated for such premises, shall have been called upon to pay, in respect of such premises, all rates made for the relief of the poor in such parish or township, during the time of such his occupation so required as aforesaid, and such person shall have *bond fide* paid, on or before the 20th day of July in such year, all sums of money which he shall have been called upon to pay as rates, in respect of such premises for one year, previously to the 6th day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of" 2 Will. 4, c. 45, and be registered accordingly.

Doddswell, for the appellant.

The claimant is not entitled to vote. By the Act of George the Second the incoming tenant is put in the same position as if he had been rated and assessed in proportion to his occupation, and he is made liable to pay his proportion of the existing rate; and the claimant not having done so, his proportion of the rate has become payable from him within the meaning of the 27th section of the Reform Act. It was easy to ascertain what was due, and the claimant had a long time to find it out in (11 & 12 Vict. c. 90);

and in case of dispute he could have had the amount settled by Justices,

Bishop v. Smedley, 2 C. B. 90 ;

Ford v. Smedley, 12 C. B. 622 ;

Moss v. Lichfield, 7 M. & G. 72.

Campbell Foster for the respondent.

The claimant's name was rightly retained. The proportionate amount of the existing rate to which the incoming tenant is made liable does not become payable from him till demanded, and then, if there is no dispute about the amount, it becomes an existing debt ; if disputed, it must be assessed by two Justices, and enforced by distress warrant.

The only rates made during the claimant's occupation were those of October, 1863, and April, 1864, and the latter the statute does not require him to pay : the former he paid, but in it no mention was made of any previous rate being due, nor was any demanded. The outgoing tenant may have paid part or the whole of the rate, and it is impossible for the incoming tenant to ascertain his proportion till it is demanded. Rates and taxes are not on the same footing ; for the latter are ascertained in amount, and as Maule, J., points out in *Ford v. Smedley* (*supra*), are by statute made payable quarterly, whereas poor-rates may be made at any time, and for any amount, and are due when made.

But even if an unascertained amount which a man is liable to pay is a sum "payable from him" within section 27 of the Reform Act, the case is cured by 6 Vict. c. 18, s. 75.

Dowdeswell, in reply.

The claimant might have tendered what he thought due, or have had it ascertained. *Id certum est quod certum reddi potest.*

ERLE, C.J.—The question is, whether the claimant is disqualified by the non-payment of rates which have become payable from him in respect of the qualifying premises. The facts are, that the claimant came in before August, 1863, and that the course of the parish was to make rates from half-year to half-year. He paid all rates made while he was in occupation of the premises, but some portion of the rate from April to October, 1863, was left unpaid ; and it is said that that portion had become payable from him within 2 Will. 4, c. 45, s. 27, by virtue of 17 Geo. 2, c. 38, s. 12. On this case some arrear of that rate was left unpaid by the outgoing tenant, but, till the sitting of the revising-barrister, the claimant went on in the belief that everything due from him had been paid. Mr. Dowdeswell says, that there was a liability to pay under the statute of George the Second, and that the rate was "payable from" the claimant by virtue of that provision ; but I take its words to mean, that the claimant was subjected to be made liable to pay a proportion of the rate, and not that he was primarily liable, and the amount to which he may be made liable depends upon a contingency. Consequently, I

think the claimant is not disqualified under the proviso to the 27th section of the Reform Act. The words in that proviso, "payable from him," to my mind involve the idea of a definite sum payable *in presenti*, in respect of which he has been guilty of some default, and not of a *debitum in presenti solvendum in futuro*, which does not become payable till it is ascertained. The proviso takes away the franchise previously granted in case the claimant has not borne his share of the public burden imposed by poor-rates and assessed taxes. But poor-rates constitute a totally different liability from taxes, which are payable by certain instalments, at certain intervals ; whereas the extent of the poor-rates cannot be foreseen ; they are laid according to the requirements of the parish ; and in some cases a peremptory *mandamus* may be made by the Queen's Bench to make and pay them forthwith : they are due the instant the rate is complete ; and in practice they are paid according to the ability of the parties rated. Nobody can tell, within common experience, what has been left unpaid by the outgoing tenant, or what the parish officers may call on him to pay. It might be, if the rate were collected weekly, that it would be but a halfpenny or so a week, and the outgoing tenant might have left an arrear of only a week or two. Should the incoming tenant be disfranchised on account of a few pence, of which he could know nothing ? I think the revising-barrister was right, and that the arrear could not become payable till the amount was ascertained.

WILLIAMS, J.—I have the misfortune to differ from the rest of the Court. The franchise here was conferred subject to the fulfilment of certain conditions, one being that the person claiming to vote shall have paid, before the 20th of July, the poor-rates which shall have become payable from him in respect of the premises ; and the question is narrowed to the inquiry whether the claimant has fulfilled this condition. The case comes to this, whether the proportionate amount of the rate, to which the claimant is made liable by the statute of George the Second, was payable from him within the meaning of the 27th section of the Reform Act. It is said that it is not payable by him, because whether he is liable to pay any given amount depends on a variety of circumstances not ascertained, and that till they are ascertained no particular amount is payable. But the statute of George says, he is "liable to pay ;" and I think he is liable to pay a sum which becomes payable within the statute of William the Fourth. I apprehend he is liable to pay the proportionate part of the rate when ascertained, exactly as if there were no difficulty in ascertaining it. When duly measured it is an exact amount, unvaried and unvarying, whatever the difficulty in getting at it may be. As to no demand being made, it cannot properly be made for a thing that is already payable. He is, therefore, liable to the proportionate amount, and to the exact sum which turns out to be due. That being so, I think

it is impossible to say he has paid all rates which have become payable from him in respect of his occupation. It may seem rather harsh to throw on the claimant the onus, not only of showing that he has paid the rates due from him, but also that he has taken steps to get himself rated, and then that he should lose the franchise on account of rates which have not been demanded of him; but I do not think it can be said he has paid all the rates which have become payable from him, inasmuch as he has not paid the proportion of the rate due from him under the statute of George the Second, and I think he is liable to pay, and it is payable from him, under the express words of that statute.

WILLES, J.—I am of opinion that the course taken by the revising-barrister was right,—or, at least, I cannot see my way to say that he was wrong. The question is, no doubt, one of very considerable nicety. The incoming tenant could not know what portion of the rate was paid, and no claim was made on him by the parish officers. The revising-barrister held there was a distinction, amounting to a difference, between non-payment of such a rate, and non-payment of a rate made while the claimant was in occupation. The incoming tenant cannot in any sense be said to be bound to take notice whether such a rate was paid: unless we go the length of saying he was bound to inquire, he could not know. The statute of George the Second was not intended to regulate generally the rights of outgoing and incoming tenants, but to give the parish officers a remedy in respect of a proportion of the rate according to the time of occupation; and provision is made for the case of an outgoing tenant not paying the rate. There is a distinction between the ordinary liability to pay a rate, and the conditional liability to pay where the outgoing tenant has not done so.

But in considering this Act we should bear in mind that the register is evidence of the right to vote, and that the liability under the statute of George is a condition imposed on the right of franchise. There is no reason why you should not apply to it the ordinary law with respect to conditions; and I cannot get it out of my mind that the parish officers here may be considered in the same light as the obligees of an ordinary bond, and the claimant as the obligor. If the condition is not performed notice should be given, and according to the ordinary principle as to who is to give notice, it must be the person who is to receive the money, otherwise there is no forfeiture. That person is here represented by the parish officers. The notice should be given before forfeiture of the right, and there is no default till it is given. On the whole, I think the revising-barrister was right.

KEATING, J.—I agree with the Lord Chief Justice and my Brother Willes, that the claimant, not having himself necessarily any knowledge of the state of

things which would make the existing rate payable by him when he entered on the occupation, there was an obligation on some one to give him notice, and I think it was for the parish officers to do so. The statute of George the Second contemplates the outgoing tenant going away and leaving the rate unpaid, and the rate so unpaid would become payable by the incoming tenant. But it is a reasonable construction, that, as no demand was made and no notice given, which would make the rate payable by him, it is not shown that the rate had become payable from him within the statute of William the Fourth.

Judgment for the respondent (without costs).

C. P. { FOY, et ux, v. THE LONDON,
14 JAN. 1865. { BRIGHTON, AND SOUTHCOAST
RAILWAY COMPANY.

Negligence of Railway Company in not providing Platform—Injury to Passenger Jumping from the Train.

A passenger on a railway was requested by a porter to get out where there was no platform, and jumped from the upper step of the carriage to the ground, without availing herself of an intermediate step, and was injured:—

Held, that there was evidence of negligence on the part of the railway company to go to the jury.

The female plaintiff was a passenger in a second-class carriage by the defendants' railway from Croydon to London. When the train in which she was arrived at the London Bridge Terminus, it drew up outside the station at a spot where there was no raised platform, the raised platform itself being occupied by trains which had previously arrived, and she was requested by one of the defendants' servants to get out there. She accordingly availed herself of the assistance of a gentleman, and jumped from the iron step of the carriage to the ground, and in so doing received a severe jar, and injured her spine. Between the iron step from which she jumped and the ground was a long wooden step, which ran the whole length of the carriage, and she might have turned round with her face to the carriage, and stepped first from the iron step to the wooden one, and then from that to the ground. The train would ultimately have been drawn up to the raised platform. Under these circumstances the present action was brought, the first count of the declaration laying a breach of duty safely and securely to carry from Croydon to London, and to provide a proper platform there; and the second count laying a breach of contract to carry safely to the platform. The plaintiffs recovered by the verdict of the jury 500*l.* damages.

Bovill, Q. C., now moved, pursuant to leave reserved, to enter a verdict for the defendants, on the ground that there was no evidence to go to the jury; or if

there were any evidence, to reduce the damages to a nominal amount.

He contended that there was no evidence of negligence to support the verdict, and that the injury was caused not only by the voluntary act of the female plaintiff, but also by her jumping in such a manner as to fall on her heels, with her feet flat.

He cited,

Wilkinson v. Fairrie, 1 H. & C. 633 ;

Corrigan v. The Eastern Counties Railway Company, 4 H. & N. 781 ;

Cotton v. Wood, 8 C. B. (N. s.) 568.

ERLE, C.J.—I am of opinion that it was a question for the jury, and one in which we are not authorised to interfere.

WILLIAMS, J.—The conduct of the defendants rendered it competent for the jury to find that they were guilty of negligence, for the mode of descent to which the plaintiff was put was not a reasonable one. Then comes the question, whether she caused the accident by negligence on her own part, and the jury negative that. It may be, perhaps, that she was not very discreet in her mode of descent.

WILLES and KEATING, JJ., concurred.

Leave to appeal was refused.

Rule refused.

Ex. } PHILLIPS v. EMMENS.
22, 24 Nov. 1864.

*Interrogatories, Disallowance of, by Judge—
Practice at Chambers.*

A Judge at Chambers rightly disallows interrogatories which, on the whole, are loosely and carelessly drawn, although there may be one or two out of the several questions unobjectionable.

On the other hand, it may be a useful exercise of a Judge's discretion in the case before him, to allow interrogatories which on the whole are properly drawn, on striking out one or two irregular questions.

Neither the Judge at Chambers, nor the Court on motion, will undertake the reforming of objectionable interrogatories.

In this action, brought by an assignee of a lease for breach of covenant, for *inter alia* removal of fixtures, an application was made to Martin, B., at Chambers, for an order to administer interrogatories to defendant. His Lordship refused the application, on the ground that several of the questions asked were irregular and objectionable.

Baylis moved for a rule to show cause why the interrogatories should not be allowed. He submitted that questions relevant to the subject-matter of the action, and which would be required to be answered

were the witness in the witness-box, should be allowed. He cited,

Zelinski v. Malby, 10 C. B. (N. s.) 839.

Cur. adv. vult.

24 Nov. 1864.

POLLOCK, C.B., gave judgment :—

We have looked into the interrogatories in this case, and think that we should not interfere with my Brother Martin's discretion. The provision for interrogating the parties to the suit is, no doubt, an important means of eliciting truth, and therefore a valuable aid in the administration of justice ; but it is not to be expected that Judges at Chambers, or the Court—still less, indeed, the Court—can take on themselves the duty of settling interrogatories which may be framed with great latitude or great carelessness. When such interrogatories come before a Judge, I think he may well say, "It is not for me to settle interrogatories, and these are in such a condition that they must be reformed, and put into a condition likely to be approved by the Judge." And certainly I do not think, because there may be one or two out of the several interrogatories which could be allowed, that the Judge is to pick them out as satisfactory, and reject the others. It is a matter for his discretion. On the other hand, if there be one or two questions put with respect to any doubtful matter, it may well be that, upon striking them out, the Judge will do well to allow the interrogatories as a whole ; but if they appear to have been carelessly or inconsiderately drawn, with diverse questions, taking the chance of their being allowed, the Judge may well request that they should be reformed. It may be remarked, with reference to the case before us, that there are several very objectionable questions. Now, it is assumed in the action that the defendant had improperly removed certain fixtures at the expiration of his lease, which fixtures, it is supposed, were on the demised premises when the lease was granted. Take, then, two questions, numbers four and five. "Were there not then—viz., at the date of the lease—or at any and what other time, shelves and hand-rail in the closet in the front room east, second floor?" Now, unless they were there when the lease was granted, it is quite unimportant, and the landlord had no right to any of them. Then, "Was there not then, or at any other and what time, a bedroom, the back-room west, second floor?" Whoever framed these interrogatories did not attend to the time when, for the purpose of giving the landlord a right to inquire at all, the fixtures ought to be on the premises.

Rule refused.

Note.—See

Robson v. Cooke, 27 L. J. Ex. 151.

Ex. Ch. } CATOR v. LEWISHAM BOARD
26, 23 Nov. 1864. } OF WORKS.

Coram—ERLE, C.J., POLLOCK, C.B., BYLES and KEATING, JJ., BRAMWELL, CHANNELL, and PIGOTT, BB.

Metropolis Local Management Acts (18 & 19 Vict. c. 120)—Sewerage Works—Pollution of Water—Remedy of injured Party.

A district board of works, acting under the provisions of the Metropolis Local Management Act, in the execution of sewerage works in their own district, fouled a stream passing through their district, and thereby polluted the water of such stream beyond their district, and created a nuisance upon lands lying without their district:—

Held, —POLLOCK, C.B., and PIGOTT, B., dissentientibus—(reversing the judgment of the Queen's Bench, holding the owner of the lands to the remedy for compensation provided by the Metropolis Local Management Act, s. 86), that an action at law might be maintained in respect of such injury.

The facts of this case were very concisely stated in the judgment of the Court below, as follows:—

The drainage of the district of Lewisham has for many years been carried into a stream, called the County Bridge Stream, which stream flows into a river, called the Pool River, both of which, in their progress onward, flow through land belonging to the plaintiff beyond the limits of the Lewisham district. The population, and the number of houses in a part of the Lewisham district having of late years greatly increased, and the want of additional drainage having occasioned an accumulation of offensive matter, causing serious inconvenience, the defendants, the Board of Health for the district, executed the drainage works stated in the case, availing themselves, as heretofore, of the County Bridge Stream to carry off the sewage matter. The effect of the additional and more effective drainage has been to cause a quantity of offensive matter to pass into the County Bridge Stream and Pool River, sufficient to pollute the water (which before was affected by the drainage only in an inappreciable degree) to such an extent as to cause substantial injury to the plaintiff.

The Court of Queen's Bench decided,* not without some hesitation, that the remedy of the owner of the injured lands was by proceedings for compensation under the Act, and not by action at law. From this decision the plaintiff now appealed.

Lush, Q.C., (Bovill, Q.C., with him,) for the appellant.

Mellish, Q.C., (Raymond with him,) argued for the defendants.

28 Nov. 1864.

Their Lordships, having taken time to consider, now delivered judgment *seriatim*; ERLE, C.J., BYLES and KEATING, JJ., BRAMWELL and CHANNELL, BB., being of opinion that the plaintiff was entitled to maintain an action; POLLOCK, C.B. and PIGOTT, B. holding the contrary opinion, and supporting the decision of the Court below.

The majority of the Court being in favour of the plaintiff,

Judgment of the Court below reversed.

Ex. Ch. } GRAY and WIFE v. PULLEN
26, 29 Nov. 1864. } and HUBBLE.

Coram—ERLE, C.J., POLLOCK, C.B., BYLES and KEATING, JJ., and BRAMWELL, CHANNELL, and PIGOTT, BB.

Negligent Performance of Statutory Duty—Action for Damages — Metropolis Local Management Act (18 & 19 Vict. 120) ss. 77, 110, 111.

An omission to perform properly a duty imposed by statute in respect of work done under the authority of the statute, entails as well upon the employer of the contractor, as upon the contractor himself, liability for damage caused by such omission.—

So held (reversing the judgment of the Court of Queen's Bench), under the Metropolis Local Management Act, sections 77 and 110.

The penalty imposed by section 111 of the said Act is a cumulative remedy.

Hole v. The Sittingbourne Railway Company, 6 H. & N. 488; 30 L. J. Ex. 81, recognised.

Appeal from the decision of the Court of Queen's Bench. The defendant Pullen was the owner of certain premises, and he employed the other defendant, Hubble, to make a drain therefrom to the sewer. The work was done under the authority of the 18 & 19 Vict. c. 120 (Metropolis Local Management Act), s. 77. In the course of the work a trench was cut across the footpath of the public highway; and it was in consequence of the insecure filling up of the ground which had been removed during this operation, that the accident happened for which the action was brought. The jury found their verdict against the defendant Hubble (the contractor), and the verdict was at the same time entered for the defendant Pullen (the employer) by the direction of the learned judge.

The Court of Queen's Bench refused* a rule to enter a verdict against the employer, Pullen, and the plaintiffs now appealed.

The case was argued by *Joseph Brown (Daly with him)*, for the appellants, and by *H. James*, for the respondent.

For the appellants it was contended that the liability of the employer rested on the breach of a statutory duty, and not on the ordinary doctrine of negligence; and, for the respondents, that the contractor had been guilty of misfeasance, for which the employer could not be liable, he having selected a competent person for the work.

The following cases were cited in the course of the arguments,

Hole v. Sittingbourne Railway Company, 6 H. & N. 488; 30 L. J. Ex. 81;

Couch v. Steel, 3 E. & B. 414;

Pickard v. Smith, 10 C. B. (N. S.) 470;

Overton v. Freeman, 11 C. B. 867; 21 L. J. C. P. 52;

Blake v. Thirsk, 2 N. R. 80; 32 L. J. Ex. 188.

Cur. adv. vult.

29 Nov. 1864.

ERLE, C.J., delivered judgment. It appeared at the trial that the defendant (Pullen) had, under the Act, employed a contractor to make and fill up the drain, but that by the negligence of such contractor the trench was not properly filled in, and the damage ensued. Upon the ground that the employer was not liable for the negligence of the contractor, the verdict was entered in favour of the employer and against the contractor—leave being given to the plaintiffs to move. The Court of Queen's Bench, however, refused the rule, and this is an appeal against their judgment. Section 77, which authorises the making of the drain into the sewer, implies the duty to fill up the ground properly; and by section 110, whenever any person breaks up the street, he shall, with all convenient speed, finish the work and fill in the ground so as to make safe the broken surface. The case of *Hole v. Sittingbourne Railway Company* (6 H. & N. 488; 30 L. J. Ex. 81), was cited and relied on for the appellants; it being urged that the person who has the drain made is responsible if the duty cast upon him by the Act is not duly performed, damage ensuing; and that the ground of action here was not a wrongful act of commission by the contractor beyond the scope of his employment, but an omission to perform the statutory duty imposed on the person who makes the drain under the authority of the Act.

In *Hole v. Sittingbourne Railway*, a duty was imposed by statute on the company, to make a bridge which would open; but the contractor whom they employed made a bridge which would not open as required by the statute, and they were held answerable upon the ground of omitting to perform the statutory duty. There the Chief Baron considered that it is no answer to a breach of an undertaking or contract to do work, that the contractor employed to do it has, by his neglect, caused a breach; and the distinction was made as to the case of a contractor doing a wrongful act not in accordance with his contract; in which case the employer would not be

liable. Now, the obligation imposed by statute is analogous to that created by an undertaking. In *Pickard v. Smith* this distinction is also made by my Brother Williams, it having been there held that the employer was responsible for the neglect of a coal-dealer, whom he had employed, in omitting to close up an opening made by the coal dealer for the purpose of allowing the coals to be shot down. It therefore appears to us that Pullen cannot be relieved from liability for the omission to fill in the ground sufficiently; and we are of opinion that the duty was implied in the grant of the power to open the drain in section 77, and is expressed in section 110. As to section 111, the penalty thereby imposed is a cumulative remedy. The only matter left to us is whether the verdict should be entered against the employer, Pullen, and our judgment is in the affirmative.

Judgment reversed.

EX. CH. } MADDICK and Another v.
30 Nov. 1864. } MARSHALL.

Coram—POLLOCK, C.B., CROMPTON, MELLOR, and
SHREE, JJ., and BRAMWELL and PIGOTT, BB.

*Provisional Director of Company, Liability of
— Authority of Secretary — Principal and
Agent.*

The provisional directors of a company in the course of formation entered into an agreement with their secretary, who was getting up the company, that they should not be personally liable for preliminary expenses. They passed a resolution directing the secretary to get their prospectus advertised: he employed the plaintiffs for this purpose, and showed them the resolution without the knowledge of the directors:—

Held,—the said agreement being unknown to the plaintiffs, and the order given by the secretary being within the apparent, though beyond the real, limits of his authority, — that the defendant was personally liable.

This was an appeal from the judgment of the Court of Common Pleas.

The plaintiffs were advertising agents, and sued the defendant for work done and for money paid for the insertion in several newspapers of advertisements of the Adelaide Port and Railway Extension and Land Company; of which company the defendant was a provisional director.

The company was projected by one Allen, who came from Australia to England, and he and one Payne agreed that between them they should receive 10,000*l.* for getting up the company, and that they should bear all the preliminary expenses. Defendant, amongst others, became a director at the request of the company's engineer, who told him that Payne and Allen would bear all the preliminary expenses.

and the same representation was made to him by the company's solicitors. On this assurance the defendant became a provisional director.

The terms of the prospectus were then settled, Payne being therein described as secretary, and defendant as a provisional director. The board, at a meeting, resolved that the prospectus be approved, printed, and advertised; and, pursuant to this resolution, Payne, the secretary, requested the plaintiffs to advertise the prospectus. The plaintiffs asked him for his authority, and he showed them, at the company's offices, but without the knowledge of the directors, a minute of the above resolution. The advertisements were thereupon inserted, and the plaintiffs sent in their bill to Payne debiting the company, and afterwards charged the defendant in this action.

The verdict was for the plaintiffs, and the Court below refused a rule to enter a nonsuit,* and the defendant now appealed.

Lush, Q.C., for the appellants; *M. Chambers, Q.C.*, *Joseph Brown*, and *Murphy*, for the respondents.

For the appellants it was argued, that if the resolution had been that the secretary was to bear the costs of advertising, he would have had no authority to pledge the defendant's credit, and that the like consequence followed from the actual agreement subsisting between defendant and the secretary. Also that the secretary had exceeded his powers in making public the resolution which was a memorandum in the company's book,

Evans's Charity v. Bank of England, 5 H. of L. Ca. 389;

Swan v. North British Company, 2 N. R. 521; 33 L. J. Ex. 273;

Reynell v. Lewis, 15 M. & W. 517;

Wyld v. Hopkins, 15 M. & W. 519;

Rennie v. Clarke, 5 Exch. 292.

For the respondents it was argued that the agreement between the defendant and the secretary could not limit or control the authority incident to the secretary's official position; and that the resolution was receivable in evidence, and was in itself a sufficient authority,

Duke of Beaufort v. Nield, 12 C. & F. 248;

Horn v. Nickolls, 1 Salk. 289.

POLLOCK, C.B., said that the judgment of the Court below must be affirmed. The resolution, which it was contended had been wrongfully shown by the secretary, could not be kept from the jury; and as it had been admitted and acted upon as evidence, the defendant's liability in this action could not be defeated by reason of the private agreement with the secretary. The resolution and the private agreement conflicted, and the jury had decided upon the evidence. The

question really was, was there evidence for the jury, and we think there was, and that the verdict should be upheld.

Judgment affirmed.

Ex. Ch.

1, 2 DEC. 1864.

BENHAM v. BROADHURST.

Coram—ERLE, C.J., CROMPTON, KEATING, BLACKBURN, MELLOR, and SHEE, JJ.

Deed of Composition—Bankruptcy Act, 1861, s. 192—Inequality.

Deed of composition under the Bankruptcy Act, 1861, s. 192, executed by the statutory majority in number and value of creditors, and made between the debtor of the one part, and "the several persons whose names and seals are hereunto respectively subscribed and set," &c., of the other part.—Covenant by the debtor with the "said several persons parties hereto of the other part respectively, their respective executors," &c., for payment of a composition of five shillings in the pound.—Several of the creditors,—the plaintiff amongst the number,—were non-assenting creditors:—

Held (affirming the Court of Exchequer), that the deed was bad under section 192, for that the non-assenting creditors, who were neither themselves, nor by trustees in their behalf, parties to the deed, were unable to sue; wherefore the deed was not, upon the face of it, for the equal benefit of all the creditors of the debtor:

Held also, that, for the purpose of curing the inequality, it was an untenable proposition that the assenting creditors might be taken to be trustees covenanting with the debtor for the whole body of his creditors.

Appeal from a judgment of the Court of Exchequer.

The defendant had pleaded, in answer to an action by plaintiff for goods sold, a deed of composition under the Bankruptcy Act, 1861, section 192. The plea was demurred to, but the Court below,* following a previous case in the same Court,† gave the plaintiff judgment, and from this decision the defendant now appealed.

The material part of the deed was as follows:—

"This indenture, made, &c., between M. B. Benham of, &c., of the one part, and the several persons whose names and seals are hereto respectively subscribed and set, being severally creditors in their own right, or in co-partnership, or being agents or attorneys of creditors of the said M. B. Benham, of the other part. Whereas the said M. B. Benham is indebted, amongst others, unto the several persons parties hereto of the other part, or their respective principals, in the several sums of money set opposite their respective names in the schedule hereto, and being unable to pay his debts in full, he hath agreed

* 3 N. R. 436; 2 H. & C. 84; 33 L. J. Ex. 47.

† *Dell v. King*, 3 N. R. 436; 2 H. & C. 84.

* 4 N. R. 21.

to enter into the covenants hereinafter on his part contained,* and in consideration thereof the said several persons hereto of the other part have agreed to enter into the covenants hereinafter on their parts contained; now this indenture witnesseth, in consideration of the premises, he the said M. B. Benham doth hereby for himself, his heirs, executors, and administrators, covenant with the said several persons parties hereto of the other part respectively, their respective executors, administrators, and assigns, in manner following—that is to say, that he the said M. B. Benham, his executors, or administrators, will pay unto all and every the present creditors of him the said M. B. Benham the sum of five shillings sterling in the pound on the several amounts of the respective debts of such creditors, by two equal instalments at intervals of nine and fifteen calendar months from the day of the date of these presents. . . . And further, that in case the said several persons parties hereto of the other part, their or any or either of their partners, executors, or administrators, shall sue or prosecute at Law or in Equity, or do, or cause to be done, any act, matter, or thing whatsoever, whereby or by means whereof the said M. B. Benham, his heirs, executors, or administrators shall or may be sued, prosecuted, or molested for any such debt or debts now due as aforesaid, contrary to the foregoing covenant and the true intent of these presents, then and in every such case he or they shall or may plead these presents in bar of any action or actions, suit or suits, that may be commenced or prosecuted against him or them, and these presents shall operate as and are hereby declared and agreed to be an effectual and absolute discharge of the same; and moreover that they the said covenanting parties, their partners, executors, and administrators respectively will, upon full payment of the said composition of five shillings in the pound on the amount of their respective debts, upon the request and at the costs of the said M. B. Benham, his heirs, executors, and administrators, make, give, sign, and execute unto him or them good and sufficient releases, acquittances, and discharges for the several debts now due and owing to them as aforesaid by the said M. B. Benham, and of and from all actions and demands in respect thereof.”

Mellish, Q.C. (F. M. White with him), for the defendant, appellant.

The covenant to pay the composition is with the several persons, &c., of the other part “respectively.” It may be difficult to construe this covenant so as to embrace all the creditors; but it is clear that the intention was to pay all the creditors, and the release is conditional on all being paid. The word “respectively” may well be omitted in construing the covenant, without doing violence to the real intention of

the parties. No doubt this deed was intended to operate under the Act, and when the requisitions of the Act have been observed, the non-executing creditors must, by the force of the statute, be taken to have executed,

Ilderton v. Jewell, 2 N. R. 324; 3 N. R. 516; 16 C. B. (N. S.) 142; 33 L. J. C. P. 148;

Ilderton v. Castrigue, 2 N. R. 167; 14 C. B. (N. S.) 99.

[CROMPTON, J.—What remedy would a non-assenting creditor who is no party to the deed have on this covenant?]

[SHEE, J.—*Ex parte Cockburn, Re Smith*, 3 N. R. 227, shows that where the deed is *inter partes*, the creditors, who have not signed, cannot sue upon the deed, and the deed is bad.]

The covenant may be construed as one with the assenting creditors for the benefit of all the debtor's creditors. This would effectuate the intention; and if held to be made with some only, yet it is for the benefit of all the creditors, and so satisfies the statute; and if the composition be not paid, the creditors would be entitled to sue for the whole of their original claims,

Clapham v. Atkinson, 3 N. R. 370; 4 N. R. 379; 33 L. J. Q. B. 81.

Holl (Sill with him), for the plaintiff.

The deed is *inter partes*, and the covenant to pay the composition is with the execution creditors only; the plaintiff, therefore, who is not a party to the deed, cannot sue on that covenant; he is therefore deprived of a remedy given to the executing creditors, and placed in a worse position,

Ex parte Cockburn, supra.

Cwr. adv. vull.

2 DEC. 1864.

THE COURT said, this case ought to be disposed of on the first point* without reference to the others. We think that the deed is invalid upon the first. The covenant on the part of the debtor to pay the composition is now in law sufficient without any *cessio bonorum*, and we must see that it is provided by the deed that the assenting and non-assenting creditors shall have equal rights under it. The Act intends that such arrangement as this may be made by the debtor with all his creditors, or with trustees for the benefit of all his creditors; but we must look to the deed to see how far the statutory provisions are carried out. In the present case it will be observed, the deed is made between the debtor and creditors who assent only, the non-assenting creditors not being parties to the deed, and not having the same right to sue as those who execute the deed. We found our judgment then on this, that the non-assenting creditors,—with whom there is

* It is necessary only to set out here the covenant not to sue, and for payment of the composition.

* The argument continued upon certain other grounds, but they are omitted, as not being proceeded upon in the judgment of the Court.

no covenant by the debtor, or with trustees on their behalf,—have not equal protection; they have not an equal right to sue, which is considered as equivalent to so much property. The deed recites that the debtor is indebted amongst others to the several parties thereto, of the other part, in the sums set opposite their respective names, and being unable to pay, agree to enter into the covenants on his part therein contained, and in consideration thereof, the said several persons thereto of the other part, agree to enter into the covenants thereafter on their parts contained, and proceeds: "Now this indenture witnesseth, in consideration of the premises, he, the said M. B. Benham, doth hereby for himself, &c., covenant with the said several persons hereto of the other part respectively, &c., in manner following," &c. Now, that covenant with the assenting creditors gives to each individual assenting creditor the right to sue, and I think the object was to give that individual right, and we are not entitled to reject that word "respectively" which is so often repeated in the deed. The object of the deed was probably to give the same rights to non-assenting and assenting creditors; but we think that has failed. It seems to us to be impossible to construe the covenant as a joint covenant with all the creditors subscribing, and reject the word referred to. Supposing we were to hold this to be a joint covenant, such a construction would be inconsistent—1st, with the individual right to sue; 2ndly, it would manifestly be inoperative. We were urged to reject the word "respectively," and to construe the covenant as one with all the creditors who assented, as trustees for all the creditors; but it could never have been meant that the whole body of creditors should be trustees. Mr. Mellish did not show us how the individual right of suit could be enforced by the respective non-assenting creditors. One set of creditors have not the covenant, or fund, so to speak, which the others have, but this the assenting creditors have. For these reasons we affirm the judgment of the Court below.

Judgment affirmed.

Ex. Ch. } GREEN and CAVE v.
2 DEC. 1864. } ATTENBOROUGH.

Coram—ERLE, C.J., CROMPTON, BLACKBURN,
KEATING, MELLOR, and SHEE, JJ.

*Registration of Bill of Sale—"True Copy" of
Schedule or Inventory.*

In lieu of the original schedule, or inventory of chattels, comprised in a bill of sale, there was appended to the bill of sale, after its execution, and by way of substitution of the original schedule, a signed copy of the said original schedule. The bill of sale, with such copy annexed, was registered, but subsequently came in question on the trial of an interpleader issue touching the said chattels. It then appeared that the signature

of the debtor had been made to each several sheet of the original schedule, but these several signatures were omitted from the substituted copy, which, however, was signed by the debtor as a whole. The jury found that both the copy schedule, and the copy bill of sale, registered as aforesaid, were true copies:—

Held (affirming the judgment of the Court below), that there had been a valid registration under the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1.

Appeal on a special case from the judgment of the Court of Exchequer, discharging a rule granted on leave reserved at the trial of an interpleader issue involving the facts following:—

In September, 1862, Green, one of the plaintiffs, lent a sum of money to a Mr. Aspry, on the security of a bill of sale of the household furniture and effects of Aspry. When the bill of sale was executed by Aspry, the schedule or inventory required by the Act, was made up of several sheets of paper fastened together, but taken out of a book in which the inventory had been originally made. These sheets, upon each of which Aspry's name appeared, were shortly afterwards detached from the bill of sale, and a copy of them, minus the name of Aspry, made and signed by Aspry, and attached to the bill of sale; and afterwards a copy of such copy, and also a copy of the bill of sale, were registered.

[With respect to the co-plaintiff, Cave, it is sufficient to say, that he had taken an assignment of the bill of sale and securities, but the deed of transfer was not registered. His title was objected to at the trial, but the only question now argued, was that of the registration of the bill of sale and inventory to Green.]

The jury, in answer to questions left to them by the Chief Baron, found that the filed copies of the bill of sale and schedule, were true copies of the original bill of sale and sheets (inventory). The verdict was thereupon entered for the plaintiffs, leave being reserved to the defendant to move.

In Michaelmas Term, 1863, the defendant obtained a rule to enter the verdict, or for a new trial, on the ground that by the removal of the sheets which formed the original schedule, there had been an invalidation of the bill of sale by alteration, and that the registration was defective. This rule the Court of Exchequer discharged, and the defendant now appealed.

Quain (Hawkins, Q.C., with him) for appellant.

There was no true copy of the bill of sale registered as required by the Act;* the deed was mutilated after it was executed, and it was no longer the same deed,

Pigot's Case, 11 Rep. 27;

* The section provides for the filing of "every bill of sale of personal chattels . . . and every schedule or inventory which shall be thereto annexed, or therein referred to, or a true copy thereof," &c.

Davidson v. Cooper, 11 M. & W. 799 ; 13 M. & W. 343, in Error.

No registration subsequent, of a copy, could make it good. The plaintiffs have invalidated the bill of sale, and, notwithstanding, seek to acquire rights under it.

[BLACKBURN, J. — They are seeking to prevent their rights being defeated. Their right was acquired.]

Coleridge, Q.C. (*Day*, with him), for plaintiffs.

The jury found that the registered copy was a true copy, and this is all the Act requires. A copy of a

true copy, is a copy of the original instrument. If there was valid registration, there was a good bill of sale. The property had passed, and the plaintiff's right had been acquired.

ERLE, C.J., gave judgment.

We are of opinion that the registration of the copy was a good registration, under the Bills of Sale Act, of a true copy of the bill of sale, and of the schedule thereto. The decision of the Court of Exchequer must therefore be affirmed.

Judgment affirmed.

EQUITY.

Lord Chancellor. }
 13 DEC. 1864. } SPIRITT v. WILLOWS.
 12 JAN. 1865. }

*Voluntary Settlement—Fraud—13 Eliz. c. 5—
 Separate Estate of Married Woman—Equity
 to Settlement.*

*Previous to the marriage of H W and E, his wife, a mortgage debt of 4000*l.*, part of the wife's property, was assigned to trustees upon trust, as to one moiety, for the benefit of the wife, her children, and relatives, and as to the other moiety, it was declared that it should not be in any way subject to the trusts of the settlement, but so long as it remained on the security of the mortgage should be held in trust only for the wife, her executors, administrators, and assigns, and when realised to be paid to her or them in the same manner as she or they would have been entitled to receive the same in case the settlement had not been made. H W, while solvent, made a voluntary settlement of the latter moiety; and afterwards became bankrupt:—*

Held 1st, that the voluntary settlement was void as against a creditor of H W, in respect of a debt contracted before the latter settlement was made:

Held 2nd, that the second moiety was not settled to the separate use of E W by the marriage settlement: but

Held 3rd, that E W might have an equity to an additional settlement out of such moiety.

By indentures dated the 13th day of March, 1861, made in contemplation of the marriage then intended and shortly afterwards solemnised between the defendants, Henry Willows and Elizabeth, his wife, a mortgage debt of 4000*l.*, the property of his wife, was assigned to trustees, upon trust, after the solemnisation of the marriage, as to one moiety thereof, for Mrs. Willows during her life for her separate use, without power of anticipation, and after her death for her children, and in default of children upon trust for certain of her brothers and sisters; and as to the other moiety, it was declared that the same should not be in any way subject to the trusts of the settlement thereby made, but should, whilst it remained on the mortgage security, be held by the trustees in trust only for Mrs. Willows, her executors, administrators, and assigns, and when realised be paid over to her or them in the same manner as she or they would have been entitled to receive the same in case the above-mentioned indentures had not been executed.

The sum of 4000*l.* still remained due on the mortgage.

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On the 24th of August, 1861, Henry Willows accepted a bill of exchange for 370*l.*, payable three months after date, and drawn upon him by one Motley, who discounted the bill with the plaintiff.

Motley died insolvent on the 24th of September, 1861. On the 27th of November, 1861, the bill was dishonoured upon being presented for payment. In February, 1862, the plaintiff recovered judgment against Willows in an action on the bill; but the latter absconded, and the plaintiff was unable to obtain satisfaction of his judgment, or any part thereof.

Subsequently Willows was adjudicated a bankrupt.

By means of the proceedings in bankruptcy, it was discovered that Willows and his wife had, on the 15th of November, 1861, executed a deed whereby a voluntary settlement was made of the second moiety of the above-mentioned sum of 4000*l.*, and the plaintiff now sought to have this deed set aside as fraudulent and void as against him.

It appeared that at the date of the last-mentioned deed, Willows was possessed of funds (exclusive of the above-mentioned sum of 2000*l.*) sufficient to pay all his debts, and leave him a balance of about 400*l.*

The Vice-Chancellor Stuart decided that the deed of the 15th of November, 1861, was void as against the plaintiff, but that the defendant, Mrs. Willows, had an equity to have an additional settlement made on her to the extent of 1000*l.*, part of the 2000*l.* Mrs. Willows now appealed.

Malins, Q.C., and Phear, for the plaintiff.

1st. The settlement of the 15th of November, 1861, is clearly void as against the plaintiff,

Warden v. Jones, 2 De G. & J. 76.

2nd. It is contended that the limitations of the settlement of March, 1861, create a separate use in favour of Mrs. Willows, but the words are insufficient for that purpose,

Gilbert v. Lewis, 1 De G. J. & Sm. 38; s. c. 1 N. R. 111.

Bacon, Q.C., and De Gex, for the defendant, Mrs. Willows.

1st. A chose in action does not fall within the statute of Elizabeth,

Sims v. Thomas, 12 Ad. & E. 536.

Nor does the Act 1 & 2 Vict. c. 110, make any difference, for the particular fund in question could not be taken in execution either at Law or in Equity.

2nd. The settlor, at the time of making the settlement, was not indebted beyond his means. He was, therefore, perfectly entitled to give away the 2000*l.* thereby settled. There is nothing in his conduct at

the time to show that he intended to defraud his creditors by executing the deed: and such intention cannot be inferred simply from his subsequent bankruptcy,

Skarf v. Souby, 1 Mac. & G. 364.

3rd. There is an evident intention in the deed of March, 1861, to settle the second 2000*l.* to the separate use of Elizabeth Willows; and where such is the intention, no particular form of words is necessary,

Shewell v. Dwarries, John. 172.

4th. At all events, the wife is entitled to a settlement out of the fund.

Nalder, for the trustees.

Maline, Q. C., in reply.

As to the defendant's first point, the question is, whether the fund, if the settlement were absent, could be made available for payment of the debt,

French v. French, 6 De G. M. & G. 95;

Neale v. Day, 28 L. J. Ch. 45.

Here, if there were no settlement, we might have obtained a charging order, or filed a bill to enforce the judgment.

As to the second point, it is not necessary to show that the settlor was insolvent when he made the settlement,

Richardson v. Smallwood, Jac. 552.

Finally, there is no case in which a married woman has been allowed a settlement under such circumstances as these.

12 JAN. 1865.

THE LORD CHANCELLOR said, the plaintiff sued as a creditor to set aside a voluntary settlement or deed of gift made by the defendant, his debtor. The plaintiff's debt was contracted before the time of making the settlement. He had since recovered judgment at Law, and the debtor had become bankrupt.

The plaintiff complained in the words of the statute of Elizabeth, that his judgment and execution were hindered, delayed, and defrauded by the conveyance of the goods and chattels of his debtor, made by this voluntary settlement. The defence was, that at the time of making the settlement the debtor reserved, and had property enough to pay the plaintiff, and all his other creditors, in full; and that the settlement, therefore, was not fraudulent, because the debtor remained solvent after he had made it.

There was some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but he thought the following conclusions were well founded. If the debt of the creditor, by whom the voluntary settlement was impeached, existed at the date of the settlement, and it was shown that the remedy of the creditor was defeated or delayed by the existence of the settlement, it was immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settle-

ment or deed of gift were impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it was necessary to show either that the settlor made the settlement with express intent "to delay, hinder, or defraud creditors," or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency, in which case the law would infer that the settlement was made with intent to delay, hinder, or defraud creditors, and was, therefore, fraudulent and void.

It was obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owed at the time of making the settlement, but not actually paying them, could not give a different character to the settlement, or take it out of the statute. It still remained a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors were delayed, hindered, or defrauded. He was, therefore, of opinion that this settlement was void as against the plaintiff.

But then the question arose, what was the property of the debtor which actually passed to the trustees of the settlement under the assignment made by the debtor? After stating that at the time of the marriage of the defendants, Mr. and Mrs. Willows, Mrs. Willows was possessed of a sum of 4000*l.*, secured on mortgage of real estates, and also of some other personal property, and also stating the settlement made previously to the marriage,—his Lordship continued that, on the clause of the settlement relating to the second moiety of the 4000*l.*, the first argument was, that the word "only" created a separate use in Mrs. Willows. No such conclusion could be maintained. For separate use, there must be words referring to the event of marriage, and creating a separate character, or directing an exclusive enjoyment. The last words of the clause were conclusive against the proposed construction.

The last-mentioned moiety or sum of 2000*l.* was the subject of the voluntary settlement of the 15th of November, 1861. The defendants contended, that if this deed were set aside, Mrs. Willows had an equity to have an additional settlement made out of that 2000*l.*, especially as her husband was a bankrupt, and unable to maintain her.

At the hearing he had had considerable doubts whether there was, under the circumstances of this case, any equity in the wife for an additional settlement; but, on examination of the decided cases, he found they had gone so far that he could not refuse an inquiry, whether an additional settlement ought or ought not to be made. It appeared to him, therefore, that the decree ought to be thus worded:

Minute.—Declare that the deed of the 15th of November, 1861, in the pleadings mentioned, is fraudulent and void, as against the plaintiff, and that so

much of the 2000*l.* mentioned in the said indenture as shall not be required for the purposes of any settlement under the inquiry hereinafter directed, is applicable in payment of the plaintiff's debt and interest thereon, and also of his costs of the suit, and refer it to the Judge in Chambers to inquire whether, having regard to the settlement made on the marriage of the defendants Mr. and Mrs. Willows, and to the present circumstances of the defendant Mr. Willows, any and what additional settlement ought to be made out of the last-mentioned sum of 2000*l.*, on the defendant Mrs. Willows and the children, if any, of the marriage.

Lord Chancellor. }
6 DEC. 1864. } ROLFE v. GREGORY.
18 JAN. 1865. }

*Trust Property—Fraudulent Appropriation—
Lapse of Time—Laches.*

When it is said that a person who fraudulently receives or possesses himself of trust property is converted by the Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him. But as the remedy is given on the ground of fraud, it is governed by the principle, that the right of the party defrauded is not affected by lapse of time, nor, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.

In the month of February, 1842, William Borer, the testator in the cause, lent to the defendant Gregory the sum of 600*l.*, for which Gregory gave Borer a promissory note dated the 23rd of February, 1842, and payable with interest at 5*l.* per cent.

By his will dated in March, 1842, Borer made a specific bequest of this sum of 600*l.* (described as the sum of 600*l.* in the hands of Mr. Gregory at interest) to the testator's son-in-law, the defendant Francis Rolfe, and one William Baker, upon trust to invest and pay the dividends or interest to the testator's daughter, the plaintiff Sarah Rolfe, during her life, but not to be subject to the debts or control of her husband Francis, or any future husband, and after the death of Sarah, upon trust for Francis during his life, and after the death of the survivor, upon trust for all the children of his daughter who should then be living in equal shares.

The testator died shortly after the date of his will. He appointed Francis Rolfe and William Baker executors, of whom Rolfe alone proved the will and assented to the bequest.

There were dealings and transactions of a private nature between the trustee Rolfe and the defendant Gregory, on which the former became indebted to the latter; and it appeared that on the 18th of April, 1842, the trustee Rolfe, in order to discharge

part of this debt, delivered over to the defendant Gregory the promissory note for 600*l.*, and an account was stated in which Gregory gave Rolfe credit for the principal and interest due on the note, and he now insisted that the debt thereby became extinguished.

The bill was filed in 1862 by Mrs. Rolfe and her children, praying that Gregory might be decreed to restore the 600*l.*, to be held on the trusts of the will. It alleged that the defendant Gregory had, at the time of the settlement between himself and Rolfe, notice of the trusts declared of this sum. It appeared, also, from Mrs. Rolfe's evidence, that she did not know of the note being delivered up until the year 1858.

The Vice-Chancellor Kindersley ordered Gregory to bring the 600*l.* into Court, to be secured for the benefit of Mrs. Rolfe's children: but as the bill was not filed until a little less, or, as the defendants contended, a little more, than twenty years had elapsed since the handing over of the note, he considered that Mrs. Rolfe had been guilty of *laches*, so as to disentitle her to any relief, and he, therefore, allowed Gregory to retain the interest during her life, and he ordered him to pay costs, except such costs as were occasioned by Mrs. Rolfe being a co-plaintiff.

Against the latter part of the decree Mrs. Rolfe now appealed.

Glassey, Q.C., and *Welford*, for Mrs. Rolfe, having stated the facts, and having waived any claim to interest before the institution of the suit,

THE LORD CHANCELLOR called on the respondents.

Bailey, Q.C., and *Jessel*, for the defendant Gregory.

Gregory was only a constructive trustee of the 600*l.* But a constructive trustee is not, in fact, a trustee at all; he is merely a wrong-doer, who in Equity is treated as if he were a trustee. Time, however, runs in his favour; and Mrs. Rolfe, having slumbered so long on her right, cannot now be heard,

Lewin on Trusts, 570, 571 (4th ed.);

3 & 4 Will. 4, c. 27, ss. 40, 42;

Phillips v. Munnings, 2 My. & Cr. 309.

Glassey, Q.C., in reply.

THE LORD CHANCELLOR said, that, he was satisfied on the evidence that Gregory had information of the manner in which the debt due from him had been bequeathed by the testator. The transaction, therefore, between these two defendants was a fraudulent abstraction of the trust property by Rolfe, and a fraudulent receipt and appropriation of it by Gregory for his own personal benefit. This wrongful receipt and conversion of trust property placed the receiver in the same situation as the trustee from

whom he received it, and by the principles of this Court he became subject in a Court of Equity to the same rights and remedies as might be enforced by the parties beneficially entitled against the fraudulent trustee himself.

It was contended that, by the transaction he had stated, the defendant Gregory became constructively trustee of the debt for the parties interested, and that his liability in this Court was to be considered as resulting merely from a constructive trust; that was from a trust raised by operation or construction of law. It was, therefore, insisted that the remedy of the adult plaintiff, Mrs. Rolfe, was lost by lapse of time, inasmuch as the suit was not instituted until more than twenty years had elapsed since the transaction complained of.

That view of the case appeared to have been adopted by the Vice-Chancellor, and accounted for the form of the decree. But it involved a misapprehension of the true principles on which the action of this Court was founded. It was founded on fraud, and not on constructive trust, and when it was said that the person who fraudulently received or possessed himself of trust property was converted by the Court into a trustee, the expression was used for the purpose of describing the nature and extent of the remedy against him, and it declared, that the parties entitled beneficially had the same rights and remedies against him, as they would have been entitled to against an express trustee who had fraudulently committed a breach of trust.

As the remedy was given on the ground of fraud, it was governed by this important principle, that the right of the party defrauded was not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remained, without any fault of his own, in ignorance of the fraud that had been committed.

In the present case, the transaction between the defendants, Rolfe and Gregory, did not become known to the plaintiffs until some time in the year 1858. There was no pretence, therefore, for treating the case of the plaintiffs as a stale demand. On the ground then of the fraud committed by the trustee Rolfe, to which Gregory was a party, and by virtue of which he received, and now held, the trust property, his Lordship would decree that Gregory should restore the property to the parties beneficially entitled, by payment of the sum due on the promissory note, viz., £600l.; but inasmuch as the plaintiff, Mrs. Rolfe, had been maintained by her husband, who was the debtor of Gregory, and as her counsel did not press for interest from an earlier period, his lordship would only direct payment of interest from the time of the institution of the suit. The decree of the Vice-Chancellor must be reversed.

Lord Chancellor. } *Ex BROOKS.*
23, 24 JAN. 1865. } *BOYD v. BROOKS.*

Principal and Surety—Executor—Retainer.

An executor who, as surety, pays off the debt of the testator after his death, is at law entitled to retain the amount which he has thus paid.

This was an appeal from the judgment of his Honour, the Master of the Rolls, on an administration summons, the further consideration of which was adjourned into Court. Among other points the following arose—

The defendant, Thomas Smith, had joined as a surety in a joint and several promissory note with his son-in-law David Brooks, the testator in the cause, for 500l. David Brooks had appointed Smith one of his executors, and he, having paid off the money due on the note, claimed to retain the amount in preference to the other simple contract creditors of the testator. This right was admitted by the Master of the Rolls. The plaintiffs were simple contract creditors.

Hobhouse, Q.C., and H. F. Bristowe for the plaintiffs.

An executor has no right of retainer in respect of money paid by him as surety after the testator's decease,

4 Leon. 236, pl. 373: Godb. 149, pl. 194, a. c.

The case of

Bathurst v. De la Zouch, 2 Dick. 460,

which seems to be against our contention, turns out on examination of the Registrar's book to have been decided on totally different grounds,*

Williams on Executors, 945 (5th ed.).

They also referred to

Copis v. Middleton, 1 Turn. & R. 224.

Selwyn, Q.C., and Lindley, for the defendants.

THE LORD CHANCELLOR said, that as the assets here were legal, the question depended on what the rule of Law was; because in the administration of legal assets, the Court gave effect to legal rules. It appeared that the testator and his father-in-law had given joint and several promissory notes, Thomas Smith joining in them as a surety only. After the testator's death Smith took them up, and he now claimed to retain out of the assets the sum he had thus paid. On this point there was some little obscurity in the law, which had been increased by cases inaccurately reported and implicitly accepted by text-writers. The case of *Bathurst v. De la Zouch* (it ought to be *Bathurst v. De Latouche*) had been supposed to be an authority on the question. But on examination it appeared that the case was not accurately reported. There the testator Morrill had been engaged with the defendant De Latouche in transactions with John Door,

in consequence of which the testator considered that in all probability his executors would make demands on De Latouche, and he, therefore, released him from all claims in respect of such transactions. By a codicil he charged his real and personal estate with payment of his debts. Then the defendant brought forward the following demand: that he and the testator had joined in a bond to Mary Latouche, and that, after the death of the testator, the defendant, who signed at his request, was called upon to pay, and that in this respect he was a creditor. On the other hand, it was alleged, that this was one of the transactions referred to by the testator, and that the defendant was a co-principal with the testator, not a mere surety. Of this opinion was the Master of the Rolls, who declared that the testator and the defendant were liable in moieties, and he, therefore, must have thought that the defendant was not a mere surety. On the facts, however, the Lord Chancellor came to a different conclusion, and reversed the Master of the Rolls' judgment, and, founding himself on the direction in the will, held that the whole of the money due on the bond was the testator's debt, and not the debt of the two; and the defendant was, therefore, allowed to retain what was due on the bond in a due course of administration. The conclusion, however, seemed to be that, if a party was bound as surety, and paid the debt, he was entitled in respect of such payment to rank as a creditor, and, therefore, if an executor, to the benefit of retainer.

The case from Leonard was not inconsistent with this view. There a man bound with the testator as a surety was sued by a *specialty* creditor, as might be concluded from the action being in debt, and he set up in defence his demand, as giving him a right of retainer. But retainer only existed as between creditors of equal degree, and as the executor there was a simple contract creditor, he could not set up his debt as against the plaintiff, and this was all that that case decided.

The Court was, therefore, obliged to say, that it was a consequence of the well-established though barbarous rule of law, that a surety being an executor, was entitled to retain, if he paid off the debt of the principal debtor, and thereby discharged the debt on which before the testator's death he was liable jointly with the testator. It would, therefore, be declared that in respect of the notes paid after Brooks's death, Thomas Smith was a simple contract creditor as against Brooks, and as such entitled to retainer.

It was a matter of regret that the state of the law admitted of such an unequal distribution, in the present case wholly in favour of one who, knowing the condition of his son-in-law's affairs, trusted him to the last, and was now enabled to sweep away the whole estate.

The petition of rehearing must be dismissed. There would be no order as to costs.

*Note.**—The following is an extract from the Registrar's book; see Reg. Lib. 1771 A, fol. 460—

"BATHURST v. DE LATOUCHE.

"Robert Bathurst, one executor of John Morrill, and Mary his wife, daughter, and residuary legatee of the said John Morrill,—Plaintiffs.

"Henry Bodsmer de Latouche, the other executor,—Defendant.

"Petition of defendant stated will of John Morrill, 1st of January, 1767, appointing plaintiff and defendant executors, and containing statement that testator and defendant had been engaged in transactions with John Door, by which both great losers, and that as testator's representatives might in consequence make demands on defendant, the testator thereby released defendant from all claims respecting such transactions, and directed all counter securities given by defendant to testator to be delivered up to be cancelled, and that by codicil testator charged all his real and personal estate with payment of debts, and that 1st of June, 1768, suit instituted, and that defendant, as executor of his mother, Mary Latouche, claimed to retain out of assets 644*l.* 19*s.* 4*d.*, for balance of debt due to her on joint bond, 1st of June, 1753, of said John Door, testator, and plaintiff, for 500*l.*, and interest. The bill charged that the defendant had used half the loan, but that testator had repaid it in full, and the bond was delivered up to him, and found amongst his papers, and that defendant ought to pay half the amount.

"By answer, defendant stated testator and Door were engaged in joint transactions, that Door was indebted to Mary Latouche in 500*l.*, that defendant pressed for payment, that testator, to relieve such pressure, undertook to satisfy Mary Latouche, and afterwards executed, &c., bond with Door, and required defendant also to sign, who did so on apprehension of being indemnified by testator, and received nothing, that Door became insolvent, and only paid 128*l.* on account, and that defendant, as executor of Mary Latouche, then dead, claimed payment of amount rendered due on bond out of testator's assets, and had retained the same.

"By order of 21st of June, 1753 (?), the Master of the Rolls had declared testator and defendant liable in moieties.

"This was defendant's petition of appeal, and by order of 29th of July, 1773, the Lord Chancellor reversed the Master of the Rolls' order, and directed that, according to the intent and meaning of testator's will, the whole due on the said bond was debt by specialty against testator's estate, and that in taking account of personal estate of testator, what should be found due should be allowed to be retained by defendant, as he is executor of Mary Latouche in a course of administration."

Lords Justices. } SHAW v. BUNNY.
7 NOV. 1864, 19 JAN. 1865. }

*Mortgagor and Mortgagee—Power of Sale—
Sale to Sub-Mortgagee.*

The purchase by a subsequent mortgagee of the interest of a prior mortgagee under his power of sale confers on the mortgagee so purchasing the same irredeemable title against the mortgagor as a stranger so purchasing would acquire.

Remarks on Baldwin v. Banister (3 P. Wms. 251, note).

By an indenture dated the 1st of May, 1851, Jere Bunny conveyed a piece of land at Newbury, which afterwards formed the site of four houses, Nos. 14, 15, 16, 17, Donnington Square, to John Dyne in fee.

By an indenture dated the 2nd of August, 1852, John Dyne mortgaged the same piece of ground, and the four houses then erected on it, to Messrs. Hallett and Hodgson to secure 1000*l.* and interest, with a power of sale in the usual form, and by another indenture, dated on the following day, he mortgaged the piece of ground and houses to Mr. Hallett alone to secure a further sum of 1000*l.* and interest. This indenture also contained the usual power of sale.

On the 1st of January, 1852, Jere Bunny purported to convey the same piece of land and houses, together with other property, to his son Henry Bunny in fee.

By an agreement dated the 4th of July, 1853, between Henry Bunny and Richard Shaw, after reciting that Messrs. Edward Bunny and Slocock had advanced 3,100*l.* on the joint account of Henry Bunny and Shaw, and 1,300*l.* on the separate account of Shaw, making together 4,400*l.*, and that these sums had been expended in buildings in Donnington Square, the legal estate of which was, it was alleged, then vested in Henry Bunny, subject to a mortgage of part thereof (not the subject of the present suit), but free from all other incumbrances; it was agreed that Shaw should become a purchaser of so much of the land and buildings as would amount to the value of 5,900*l.*, and should thereupon execute a mortgage to Messrs. Edward Bunny and Slocock, to secure that sum, leaving 1,500*l.* to be arranged as between Henry Bunny and Shaw in an account to be afterwards made up.

It was subsequently agreed, that John Dyne should release all his claims on Donnington Square, and that Shaw's mortgage to Messrs. Edward Bunny and Slocock should be for the sum of 6000*l.*

The release by Dyne to Shaw was executed on the 5th of October, 1853. On the 17th of the same month, Henry Bunny executed the conveyance to Shaw, and on the 24th, Shaw executed the mortgage to Messrs. Edward Bunny and Slocock.

Henry Bunny shortly afterwards left the country, and the existence of the indentures of the 2nd and 3rd

of August, 1852, was then first discovered by Messrs. Edward Bunny and Slocock.

Default was made by Dyne in paying the mortgage debts secured by the two indentures, and Messrs. Hallett and Hodgson, in exercise of their powers of sale, put up the mortgaged property to public auction, but failed to obtain a bidding, and Edward Bunny afterwards purchased the property for 1,100*l.*, there being then a sum of more than 1,350*l.* due on the security of the indentures of the 2nd and 3rd of August, 1852.

Under the above circumstances a bill was filed by Shaw against Messrs. Edward Bunny and Slocock, offering to adopt the purchase from Messrs. Hallett and Hodgson, and praying for a decree for the redemption of the mortgaged property.

The Master of Rolls by his decree, dated the 4th of March, 1864, declared that Edward Bunny was absolutely entitled to the property comprised in the mortgages to Messrs. Hallett and Hodgson, and made the usual redemption decree as to the remainder of the property.

Against this decree the plaintiff appealed, contending that he was entitled to redeem the whole of the property.

Baggallay, Q.C., and *Morris*, for the appellant, argued, that the mortgagee of an equity of redemption could not purchase under the power of sale of the mortgagee in fee, except upon the terms of being liable to be redeemed by the mortgagor.

They cited,

Baldwyn v. Banister, cited in the note to *Robinson v. Pett*, 3 P. Wms. 251 ;
and distinguished,

Davis v. Barrett, 14 Beav. 542.

Selwyn, Q.C., and *E. F. Smith*, for the respondents, contended, that when a mortgagee sold under a power of sale, it did not matter, in the absence of fraud, whether the purchaser were a subsequent incumbrancer or not, or whether he bought in order to perfect his own security.

They referred to,

Darcy v. Hall, 1 Vern. 48 ;

Morrel v. Paske, 2 Atk. 52 ;

Dobson v. Land, 8 Hare, 216.

Baggallay, Q.C., in reply.

KNIght BRUCE, L.J., said, that although the plaintiff had appealed from the whole of the decree of the Master of the Rolls, the only point not settled was, whether the declaration that Edward Bunny was absolutely entitled to the houses, Nos. 14, 15, 16, and 17, Donnington Square, was well founded! The question was, whether, when a landed estate had been mortgaged in succession to different persons, and the second mortgagee purchased from the first mortgagee under his power of sale, such a state of things gave the purchaser the same irredeemable title against the

mortgagor as a stranger so purchasing would have? The Master of the Rolls had decided that, in the absence of special circumstances, the relation of prior and puisne incumbrancer did not affect the absolute title of the purchaser as against the mortgagor. In the present case there were no special circumstances and his Lordship agreed with the Master of the Rolls that there was nothing to prevent the defendant Edward Bunny from buying the mortgaged property. The case would have been different if the defendant had availed himself of his position as mortgagee to gain any advantage, but nothing of the kind had been proved.

TURNER, L.J., said that the case was not free from difficulty, and his opinion had fluctuated much. The Court did not regard a mortgagee, who had purchased a prior mortgage, as a trustee, but that did not necessarily alter his character as mortgagee. The question was, on what condition ought a right to redeem, not acknowledged at Law, be granted in Equity. The mortgagee purchasing claimed to change his character, and to be released from his contract with the mortgagor to reconvey the mortgaged property; but his Lordship felt serious doubt, whether a purchase by a mortgagee could be considered as standing on the same footing as a purchase by a stranger, and if a case could have been found to support the distinction, he should not have hesitated to follow it. *Baldwyn v. Banister* had been cited for that purpose, but he had examined the case in the Registrar's book, and found that it amounted to this: a mortgagee had bought the dower of the mortgagor's wife for 50*l.*, and claimed to retain that sum in a redemption suit, and so it was decreed without dispute. He had been unable to find any authority to support the distinction to which he inclined, and the Master of the Rolls in the present case, and Kindersley, V.-C. in *Parkinson v. Hanbury* (1 Drew. & Sm. 143), were of a contrary opinion. He was compelled, therefore, to submit to the decree, but not without reluctance. There would be no costs of the appeal.

Note.—The short note of *Baldwyn v. Banister*, in 3 Peere Williams, 251, is incorrect, and the mistake has been perpetuated to some extent in the report of the judgment of Sir J. Wigram in *Dobson v. Land*, 8 Hare, 221. The case, *Baldwyn v. Banister*, was this: two infants were entitled to the property of their mother, who died intestate; their uncle took out administration, and got possession of the mother's personal estate, and gave a judgment in trust for the infants. He then died leaving a widow. The bill was filed by the infants against Banister, a mortgagee of the uncle prior to the judgment, and against the executors of the uncle's will, for an account of the personal estate of their mother, and to obtain the benefit of the judgment. Banister, by his answer, stated that he was mortgagee of the dower of the uncle's widow for the sum of 50*l.*, and he submitted that he was not

answerable to the plaintiffs for the judgment given by the uncle until he should have received the whole of his mortgage money, and interest, and the 50*l.* paid for the dower. It would seem, therefore, that no attempt was made by the mortgagee to retain the estate against the infant plaintiffs; see Reg. Lib. 1717, A fol. 609.

Lords Justices.
19, 20 DEC. 1864.
20 JAN. 1865.

THE STAFFORDSHIRE AND WOR-
CESTERSHIRE CANAL COMPANY
v. THE BIRMINGHAM CANAL
COMPANY.

*Easement—Supply of Water—Artificial Water-
course—Canal—Prescription.*

The defendants' canal communicated, under the authority of their Act, with the plaintiffs' canal; the defendants' canal was of the higher level. The defendants had for more than seventy years, whenever a barge passed from their canal to that of the plaintiffs, allowed a lockful of water to flow into the plaintiffs' canal:—

Held, in the absence of express legislative enactment, grant, and agreement, that the plaintiffs had not acquired a right to the continued supply of water by prescription.

Observations on the acquisition of rights by prescription in canals and artificial watercourses.

This was an appeal from a decree of Stuart, V.-C., restraining the defendants from depriving the plaintiffs, either by diversion or pumping, of any of the water which had been hitherto passed through the lowest lock of the defendants' canal into the summit level of the plaintiffs' canal at Atherley.

The case is reported in the Court below, ante, 5 N. R. 33, where the facts are fully stated.

The *Attorney-General*, *Craig*, Q.C., and *Jolliffe*, for the plaintiffs, in support of the decree, contended—

1st. The right claimed by the plaintiffs was founded on a Parliamentary contract contained in, or necessarily to be implied from, the terms of the defendants' Act, 8 Geo. 3, c. 38. The two companies had a common interest in the communication between the two canals, and it was provided by the defendants' Act that if the defendants failed to make the communication within six months, the plaintiffs might do so at the defendants' expense; and it was evident that when the defendants' Act was passed, the Legislature had contemplated the construction of a system of locks as the means of overcoming the fall of 132 feet between Wolverhampton and Atherley, and a system of locks as then constructed necessarily involved the transmission into the plaintiffs' canal, for every barge which passed into it from the defendants' canal, of so much water as was necessary to fill the largest of the locks through which the barge had passed, the surplus water, if any, passing into the plaintiffs' canal, over weirs constructed for that purpose. The deed of

1771, under which the joint committee was appointed, gave the plaintiffs practically the power of making the communication at Atherley as they pleased, and the plaintiffs maintained that their consent was asked and given to the construction of the additional lock in 1791.

2nd. The plaintiffs, however, only claimed such a user of the water as they then had, and had enjoyed for upwards of seventy years.

The case was within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

It would be said, that the canal was an artificial watercourse, and that the passage of the water was intermittent. It was laid down in

Magor v. Chadwick, 11 Ad. & E. 571, that the law of watercourses was the same whether natural or artificial; that rule had been qualified in

Wood v. Waud, 3 Exch. 748, where it was said, that the right to artificial watercourses, as against the party creating them, must depend on the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created. In the present case the watercourse was permanent, and the circumstances of the case were distinctly in favour of the right claimed by the plaintiffs.

The plaintiffs' canal, being subject to the servitude of receiving water from the defendants' canal, was entitled to the reciprocal benefit, according to the dicta of Patteson, J., in

Magor v. Chadwick, *loc. cit.*

3rd. The terms of the Consolidation Act, 5 & 6 Will. 4, c. xxxiv., expressly provided for the plaintiffs' interests, by regulating the supply and passage of water in the defendants' canal; and by the saving clause (section 258) it was enacted, that nothing in the Act contained should affect any of the rights of the plaintiffs, or empower the defendants to obstruct the navigation of the plaintiffs' canal, or to take away, lessen, alter, divert, or obstruct any of the springs, streams, feeders, waters, or watercourses, which then were, or for the time being should be, lawfully taken or used for the purposes of the plaintiffs' navigation, in order to the supplying the same with water.

The act of the defendants, which they complained of, would tend to obstruct the navigation, and lessen the feeders and waters of the plaintiffs' canal.

Bacon, Q. C., and *Kay*, for the defendants, the appellants, argued—

1st. Even if there were such a parliamentary contract as the plaintiffs suggested, that would not preclude the defendants from improving their canal, from time to time, under new inventions in physical science. The only thing which had been insisted on by the Legislature was a communication between the two canals; the plaintiffs had a right to so much water as was necessary to float each barge out of the last lock of the defendants' canal on to the highest level of

the plaintiffs' canal, but that was all. In cases where the Legislature had intended that there should be not only a communication between two canals, but also a passage of a certain quantity of water with each barge, it had been expressly provided for by a clause fixing the depth of the lowest lock of the upper canal (usually called a ten-foot clause),

16 Geo. 3, c. 28, p. 802;

16 Geo. 3, c. 66, p. 1647;

They also referred to,

32 Geo. 3, c. 81, s. 10.

2nd. Even if the canal were an artificial watercourse, the passage of the water was so uncertain and intermittent, that no right could be acquired in it by prescription. The quantity of water which passed, varied according to the height of the water in the summit level of the defendants' canal, and the displacement of the barges which passed through the locks. It had also been contemplated by the Legislature that two barges might pass at once.

They referred to

Arkwright v. Gell, 5 M. & W. 203;

Greatrex v. Hayward, 8 Exch. 291;

Raustrom v. Taylor, 11 Exch. 369;

Broadbent v. Ramsbotham, 11 Exch. 602;

Elwell v. Birmingham Canal Company, 3 H. of L. Ca. 812,

which last case was on all fours with the present one.

3rd. But the canal was not a watercourse at all; each level of the canal was a pond fed by water artificially introduced and arranged to allow of an intermittent escape: the defendants had not only a right to use the water in the canal in a particular way for the purposes of navigation, but they had also an actual property in the water itself. When the last lock was shut the water in it belonged to the defendants; the right of the plaintiffs only began when the defendants chose to let the water out into the lower level.

4th. The defendants were trustees of their canal for the public, and the prescription claimed by the plaintiffs rested on a grant which the defendants had no power to make,

Rochdale Canal Company v. Radcliffe, 18 Q. B. 287.

The Attorney-General, in reply, contended, that a canal was an aqueduct or channel of inland navigation; not like a pond or ditch in a man's field or an adit in his mine. A canal answered the test suggested in, *Wood v. Waud* (*loc. cit.*).

The cases of,

Elwell v. Birmingham Canal Company (*loc. cit.*);

Rochdale Canal Company v. Radcliffe (*loc. cit.*),

were distinguishable from the present one. The first was a dry question on the construction of an Act of Parliament; in the latter the question was, whether the plea of twenty years' prescriptive right was maintainable on the facts.

The defendants' Act contained clauses which

showed that the Legislature had contemplated the canal being used in the ordinary way, and it did not follow that, because there was no ten-foot clause in the defendants' Act, that the Legislature did not intend that the plaintiffs should have the full benefit of the water which passed through the last lock of the defendants' canal. The defendants, by the alteration which they proposed to make, would obstruct the navigation of the plaintiffs' canal within the meaning of the saving clause in the Consolidation Act: it was impossible to say that the plaintiffs could not by any means get water from other sources; but the term "obstruction" did not necessarily mean an obstruction irremediable by art and money.

KNIGHT BRUCE, L.J., said, that this was a question of the right of the plaintiffs to use a portion of water of the defendants' canal. The defendants had contended that the alleged right could exist only, if at all, by virtue of some statute, or of some grant or contract made by the defendants or their predecessors in title. The defendants were right in that contention; there was no other way in which the right could have arisen.

The plaintiffs had not shown, in his opinion, any statutory right, or any such grant or contract, and he had arrived at the conclusion that, although the length of time during which the water had continued to flow into the plaintiffs' canal was very considerable, yet the nature and character of the respective rights and interests of the parties were unaffected, and ought to preclude the belief that there was ever any grant or contract for the use of the water as claimed by the plaintiffs. The plaintiffs' use of the water had been merely permissive.

TURNER, L.J., said, it had been argued for the plaintiffs, first, that it ought to be concluded on the facts of the case, that it was the intention of the Legislature that the plaintiffs should have the benefit of the water in question; and, secondly, that the plaintiffs had acquired a right to such water by length of time and enjoyment.

On the first point, it had not been contended that an express Parliamentary contract could be shown; but it was insisted that such a contract should be implied or presumed, on the ground that the deed of agreement of 1771 had been entered into, and the canal completed on that footing; and if so, the defendants were not afterwards at liberty to defeat the intention of the Legislature.

The Court had to consider, not so much what was contemplated when the defendants' Acts were passed, as whether what was then contemplated was to remain for ever unchanged. With respect to the argument which had been founded on the deed of 1771, the circumstances which led to the deed being made, and the fact that the provisions of the deed were limited to the construction of the canal, and contained no

reference to the mode in which the water of the canal was to be used, was opposed to the plaintiffs' claim.

With respect to the second point, it was the first duty of a canal company to keep open the canal. When the Legislature imposed that duty, it intended that control over the water of the canal should be vested in the company. A canal stood on a different footing to natural or artificial watercourses, for its waters were devoted by the Legislature to special purposes. In the case of artificial watercourses, the purpose of their construction was to be considered in ascertaining the acquisition of rights by private persons, *a fortiori* in the case of a canal. There would be very great difficulty in holding that strangers could acquire rights in the water of a canal.

Still further, the Acts of Parliament on which the plaintiffs relied were permissive only. The plaintiffs had cited several sections of the Consolidation Act, especially section 258, and had argued that what the defendants proposed to do would be a diversion or obstruction within the meaning of that section; but it would be a forced construction to apply the term "obstruction" to such indirect consequences as would result from the defendants' proposed works, and he thought that the word "waters" in the same clause was to be read in connection with "springs," &c., which the plaintiffs were empowered by their own Act to take for the purposes of their canal, and that it did not refer to a casual supply obtained from the defendants' canal. The bill would be dismissed, without costs.

Master of the Rolls. } SWIFT v. SWIFT.
18, 23 JAN. 1865.

Separation Deed—Custody of the Children— Public Policy—Misconduct of the Father.

In a separation deed, as a rule, a contract by a father to relinquish the custody of his child is illegal.

The benefit of the child is the foundation of the rule.

If the control of the father is injurious to the child, such contract may be sustained.

By an indenture bearing date the 20th day of June, 1863, made between the defendant Robert Swift, of the first part, the plaintiff Mary Ann Swift, of the second part, and William Lamb, of the third part, after reciting that some unhappy differences had arisen between Robert Swift and Mary Ann Swift his wife, and that they had in consequence mutually agreed to live separate and apart from each other, and that Robert Swift had agreed to pay Mary Ann Swift one annuity of 52*l.* for her maintenance during the joint lives of herself and Robert Swift, and that Robert Swift had also agreed that Mary Ann Swift should have the sole care, and management, and protection

of Sarah Ann Swift and William Lamb Swift, the two infant children of Robert Swift and Mary Ann Swift, and that Robert Swift would during the respective minorities of the children pay to Mary Ann Swift the further annuity of 25*l.* for the maintenance of each of the children during his or her minority, and that he, Robert Swift, should, and would, also yearly, and every year pay to Mary Ann Swift such further sums of money, costs, charges, and expenses as she should incur, pay, or sustain in or about the education of the children, or either of them consistently with their station in life; it was witnessed that in pursuance of such agreement, and in consideration of the covenant thereafter contained on the part of William Lamb, Robert Swift did thereby covenant and agree with William Lamb that Mary Ann Swift should, notwithstanding her coverture, live separate and apart from Robert Swift, as if she were a *feme sole*; and also that the children of Robert Swift and Mary Ann Swift should at all times thereafter be under the sole care, management, and protection of Mary Ann Swift; and also that he, Robert Swift, would every year, during the joint lives of Robert Swift and Mary Ann Swift, pay into the proper hands of Mary Ann Swift, for her separate use, one clear annuity of 52*l.*, and also that he, Robert Swift, would, during the respective minorities of the children, pay unto Mary Ann Swift the further annuity of 25*l.* for the maintenance of the children during his or her minority; and also that he, Robert Swift, would yearly, and on demand, pay to Mary Ann Swift such further sums of money, costs, charges, and expenses, as she, Mary Ann Swift, should incur, pay, or sustain in or about the education of the children, or either of them, consistently with their station in life; and it was further witnessed that in consideration of the covenants thereinbefore contained on the part of Robert Swift, William Lamb did thereby covenant with Robert Swift, that during the continuance of separation, he Robert Swift should not be liable to pay for the maintenance of Mary Ann Swift and the children, or to pay any debt which should at any time during such separation be contracted by Mary Ann Swift, and that he William Lamb should at all times thereafter keep indemnified Robert Swift against the maintaining of Mary Ann Swift and the children during such separation.

Shortly after the date and execution of this indenture, the plaintiff went to reside in the town of Nottingham, and took with her her two children, Sarah Ann Swift and William Lamb Swift, who were, when this suit was instituted, of the respective ages of eight years and five years, and she continued to reside at Nottingham separate and apart from her husband, and to have the sole care, management, and protection of her two children.

On the 21st day of March, 1864, the defendant came to the plaintiff's residence in Nottingham, and unsuccessfully endeavoured to carry off by force the infant

Sarah Ann Swift: and on the 4th day of April following, the bill in the present suit was filed.

The plaintiff had separated from the defendant on account of a criminal assault alleged by the infant Sarah Ann to have been committed upon her by the defendant.

The bill prayed that the defendant might be restrained from removing and from prosecuting any proceedings to obtain the infant children, or either of them, from the custody of the plaintiff and from interfering with the plaintiff in the sole management and protection of the infant children. The bill also prayed that an account might be taken of what was due to the plaintiff for the maintenance of herself and children under the indenture, and that the defendant might be ordered to pay what should be certified to be due to the plaintiff, and the costs of the suit.

Baggallay, Q.C., and W. Morris, for the plaintiff.

We feel a difficulty in coming to the Court to prevent a father from interfering with his children. In an ordinary case, an agreement whereby a father deprived himself of parental influence would be against public policy. There is a difference between a deed actually executed, and an executory agreement. In the former case the Court will disregard a covenant contrary to public policy, and will enforce such of the provisions as are in accordance with law; in the latter case, if any part of the agreement is contrary to public policy, the Court will not enforce the agreement at all,

Vansittart v. Vansittart, 2 De G. & J. 249.

In the present case, the separation deed was executed by the husband upon the ground of his misconduct. That misconduct overrides all rules as to parental authority, and public policy itself requires that he should be deprived of his children.

Selwyn, Q.C., and Bromhead, for the defendant Robert Swift.

This is a bill for specific performance of a deed contrary to public policy.

There may be a distinction between a deed and an executory agreement; but here relief is sought on the most objectionable part of the deed. The argument on the other side is, that when a father is guilty of gross misconduct, then he can make a contract contrary to public policy; but no misconduct can enable a father to contract not to interfere with his children,

Vansittart v. Vansittart (loc. cit.);

Walrond v. Walrond, Johns. 18;

Hope v. Hope, 8 De G. M. & G. 731.

Suppose that in such a case as

Wellesley v. Wellesley, 2 Bligh, N. R. 124,

the father repented and became a virtuous man, would not his obligations revive, and could such a deed as this then be brought forward?

In the present case, there are two questions. Is a

father to be deprived of his right to his children, and is a person to whom the law has not given the right to come here by contract and claim their custody? The parties should be left to their remedy at Law, where the trustee can enforce his right by action on the covenant,

Seagrave v. Seagrave, 13 Ves. 439.

The claim for maintenance is a mere money demand, and we might have demurred for want of equity.

Baggallay, Q.C., in reply.

The Court will interfere by injunction where it cannot decree specific performance,

Lumley v. Wagner, 1 De G. M. & G. 604.

In the case of a charter-party, the Court will restrain a person from employing his vessel inconsistently with the charter-party. The Court will interfere by injunction to prevent the violation of a covenant. In

Hunt v. Hunt, 31 L. J. Ch. 161, the Court restrained a husband from suing for a restitution of his conjugal rights.

THE MASTER OF THE ROLLS said, that this was a suit to enforce performance of a deed of separation between a husband and wife. There was sufficient consideration for the deed, and it was executed by a trustee under a power of attorney. It was, however, contested on account of a covenant which was said to be void, and to vitiate the whole deed. The rule was well laid down in *Vansittart v. Vansittart* (*loc. cit.*), that a covenant by a father to relinquish the custody of his children was bad, and against the public policy of the law, which held it to be desirable that the father should exercise superintendence over his children. But though this was a general and almost an universal rule, there existed cases in which the control of the father was injurious to the children. There Equity would interfere to prevent that control, and to remove the children from the father. In this, Equity did not act contrary to the policy of the law, but held this case to be an exception to the general rule.

The advantage of the child was the foundation of the rule. The reason why the covenant was bad was because the superintendence of the father was for the benefit of the child; but of course where it would not be for the benefit of the child the same policy made the covenant good in that particular instance. However it must be a strong case which could justify the Court in applying this principle. On the 10th of June, 1863, Sarah Ann told her mother that her father had criminally assaulted her. The mother took the child to a surgeon in order to ascertain whether there was any foundation for the charge. The child repeated the charge to Marsh, the surgeon, who found that the offence had been committed by some one. His Honour was asked, on the simple denial of the defendant, to dismiss this bill with costs and to deliver up this child to her father, but his Honour declined to do

so, and would make a decree for the plaintiff as asked, the defendant to pay the costs.

Master of the Rolls. { *Re THE GENERAL INTERNATIONAL AGENCY COMPANY (Limited).*
21, 23 JAN. 1865.

Practice—Winding-up—Provisional Liquidator—Costs.

Costs of appearance of a provisional liquidator disallowed.

In this case two winding-up petitions had been presented.

At a general meeting of the company, on the 19th of December, 1864, a proposal to amalgamate with a new company was rejected, and it was agreed almost unanimously that a petition for a compulsory winding-up should be immediately presented by the chairman. It was further agreed that the petition should not be heard until another meeting had been held to confirm, in accordance with the articles of association, the resolutions of the first meeting. In the meantime, the petition was presented, and Whinney was appointed provisional liquidator. The second meeting was held on the 4th of January, 1865, when an amendment proposing to wind-up compulsorily was lost on a poll, in consequence of the rejection of proxies in its favour; and in accordance with a resolution passed at this second meeting, a second petition was presented by the chairman and the secretary, praying that the company might be wound-up voluntarily under the supervision of the Court; and at the same meeting Whinney was appointed liquidator under the voluntary winding up.

Southgate, Q.C., and *Brooksbank*, for the petitioners upon both petitions.

G. Hastings (Selwyn, Q.C., with him), for the dissentients at the meeting of the 4th of January, denied the validity of the majority at that meeting, and argued that the company ought to be wound up compulsorily.

Baggallay, Q.C., and *C. A. Turner*, for the company, and *Edmund James*, for Whinney, took no part.

23 JAN. 1865.

THE MASTER OF THE ROLLS said, that, on the evidence, it was uncertain what the wish of the majority of the shareholders really was. He thought, however, on the whole, that it was in favour of a voluntary winding-up under the supervision of the Court, and he considered that that was the most advantageous course. He would, therefore, make the usual order to that effect.

Edmund James asked for the costs of the provisional liquidator, as he had been made an officer of the Court.

He had been served with the second petition, and as charges were made against him by the affidavits of the dissentient shareholders, and his continuance as liquidator was threatened to be discussed, he was bound to appear. Stuart, V.-C., had, on the 1st of July last, allowed the provisional liquidator his costs in two instances (*viz.*, *Re Snowbrook Mining Company*, and *Re East Dyliffe Mining Company*, unreported), where the same order as the present one had been made.

THE MASTER OF THE ROLLS said, that he did not think the practice had been for the provisional liquidator to appear. In the case of the orders made by Stuart, V.-C., there was a voluntary winding-up. In the present case one of the petitions was for a compulsory, and the other for a voluntary, winding-up, and Whinney had been previously appointed provisional official liquidator. He was thus in the same position as a receiver appointed *pendente lite*, who, as was well established, was not justified in appearing. He could not be allowed his costs.

Master of the Rolls. } HARROP v. WILSON.
21, 24 JAN. 1865.

Dower—Apportionment—11 Geo. 2, c. 19, s. 15.

Land of an intestate having been sold compulsorily, and a part of the purchase money appropriated to meet his widow's dower:—

Held, that, under 11 Geo. 2, c. 19, s. 15, the dividends arising from such appropriated part were apportionable between the widow's executors and the heir-at-law.

Land belonging to an intestate, who died in 1822, had been taken by the corporation of Shrewsbury under the compulsory powers of a local improvement Act. Of the purchase-money, one-third had been left in Court, and the dividends paid for dower to the intestate's widow. The widow having died in 1864, the heir-at-law now petitioned for the payment of such third to him; and the question arose whether the dividends of the last quarter were apportionable between the executors of the widow and the heir-at-law. It was admitted that 4 & 5 Will. 4, c. 22, did not apply.

T. H. Terrell for the heir-at-law, the petitioner.

This case is not within the 11 Geo. 2, c. 19, s. 15, because, even treating this money as land, there was no assignment of dower, and consequently the under-tenant would be tenant by demise of the heir-at-law, and not of the widow: the demise did not, therefore, terminate with the death of the widow.

Renshaw, for the widow's executors, *contra*, referred to

Ex parte Smyth, 1 Swan. 337.

T. H. Terrell in reply.

THE MASTER OF THE ROLLS said that the money must be treated exactly as if it were land, as the houses had been taken compulsorily, and the money was subject to be re-invested in land. If this had been done, the land would have been assigned to the widow for her dower, and if the land was producing rent there must have been an under-tenant, in occupation of it, who would have been tenant by demise of the widow herself, and whose interest would therefore terminate with the death of the widow. The widow must not suffer by the re-investment not having been made, but the dividends on the sum in Court must be considered as if they were rent. The case thus came within the statute. The dividends must be apportioned, and the widow's executors be allowed their costs.

Kindersley, V.-C. } HULL v. FALKNER.
17, 19 JAN. 1865.

Administration—Time—Proof of Debt.

In an administration suit, after an order has been made for the payment of a specific dividend to the creditors who have proved, a creditor will not, though the dividend has not actually been paid, be allowed to come in and prove, so as to disturb that order.

This was a motion in a creditor's suit.

A Mrs. Bayfield, a specialty creditor of the deceased, had previously instituted an administration suit, which, however, she had stayed on learning that this suit had been for a similar purpose.

When the present cause came on for hearing on further consideration, an order had been made to pay 2s. (afterwards reduced to 1s. 10½d.) in the pound to the specialty creditors who had proved at that time. Mrs. Bayfield applied by her counsel for her costs in the suit which had been stayed, but she did not prove her debt.

Cheques had been drawn but not countersigned, and other steps had been taken by the creditors, who had proved, to obtain payment of their dividends.

Mrs. Bayfield now moved to be allowed to come in and prove equally with the other specialty creditors, and to stay the payment of the dividends of 1s. 10½d. She offered to pay the costs occasioned by her coming in, including the costs of determining the amount of the reduced dividend.

Karslake, in support of the motion, argued that the fund was still in Court, and that, in accordance with,

Lashley v. Hogg, 11 Ves. 602;

Angell v. Haddon, 1 Mad. 529;

a creditor, under such circumstances, would be allowed to come in and prove, on being *mailed* in

costs to the extent occasioned by the creditor's laches.

Kekewich, on behalf of creditors who had proved, opposed the motion, on the ground that the proceedings for payment had gone too far, he referred to,

Cattell v. Simon, 8 Beav. 244 ;

Hartwell v. Colvin, 16 Beav. 140.

Hull, for the defendant, the administrator, on the same side, cited,

Rule 25 of the 35th Order.

Kenslake, in reply, cited,

Brown v. Lake, 1 De G. & Sm. 144.

19 JAN. 1865.

KINDERSLEY, V.-C., said that the order was tantamount to actual payment, the matter to this extent had been taken out of the hands of the Chief Clerk, the Accountant-General having been ordered to pay specific sums to each of the creditors. The order must not be disturbed.

Minute.—Motion refused, with costs.

Stuart, V.-C. } WILLIAMS v. WILSON.
24 JAN. 1865. }

Will, Construction—Annuity payable on Quarter-Days—Commencement.

A testator gave an annuity for life, and an annuity for twenty-one years from his death, both payable by four equal quarterly payments on the usual quarter-days:—

Held, that a proportional part only of each annuity was payable on the first quarter-day after his decease.

This was a special case stated for the opinion of the Court.

James Richards, by his will, dated the 20th of November, 1845, devised a portion of his real estate to Seymour and Bromage, upon trust to pay to his wife, Jane Richards, an annuity of 125*l.* for her life, and to one of his daughters an annuity of 150*l.*, for the term of twenty-one years from his decease, if she should so long live ; and in case his wife should die in the lifetime of the daughter, then to pay to the daughter for her life the further annuity of 125*l.* The testator then devised other real estate upon similar trusts in favour of his wife and another daughter ; and directed that the several annuities thereinbefore given, should be payable by four equal quarterly payments on the 25th of March, the 24th of June, the 29th of September, and the 25th of December, in every year ; and that on the decease of any annuitant a proportionate part of his or her annuity should be payable for so much of the current quarter as should have elapsed. The testator subsequently bequeathed to Seymour and Bromage, annuities of 50*l.* and 20*l.* respectively, so long as they should continue to execute the trusts of

the will ; and directed that these sums should be retained quarterly, on the days before mentioned.

By a codicil, dated in 1857, the testator substituted the plaintiffs, in the place of Seymour and Bromage, both as trustees and annuitants.

The testator died on the 21st of September, 1862.

Jane Richards died on the 19th of April, 1863.

The principal questions for the Court were : whether Jane Richards, and the two daughters, were entitled to receive on the 29th of September, 1862 (the first quarter-day after the death of the testator), a full quarter's payment, or only a proportionate payment, as from the day of the testator's decease ; and similar questions with regard to the additional annuities given to the daughters on the death of Jane Richards, and to the annuities given to the trustees.

F. O. Haynes, for the plaintiffs, the trustees of the will, submitted that the direction to the trustees to retain their annuities on the quarter-days placed them in the same position as the other annuitants.

Malins, Q.C., and *Ince*, for the representative of Jane Richards, and *Dauney* for the testator's two daughters, contended, that the annuitants were entitled to a full quarter's payment on the first quarter-day after the testator's decease. It was usual to insert an express provision to that effect, and such, no doubt, had been the testator's intention. It was impossible otherwise to satisfy the words "equal quarterly payments :—" the payments were to take place on the days named, and were to be equal.

Lewin, for those entitled to the real estate, was not called on.

STUART, V.-C., said, that as to the annuities given to the plaintiffs, the clause directing equal quarterly payments, referring as it did to the annuities "hereinbefore given," did not apply ; and as the plaintiffs were to enjoy the annuities while executing the trusts of the will, the time of commencement could not be in the testator's lifetime. With regard to the other annuitants, the word "equal" had not the force contended for. The object of that clause was to secure payments at equal intervals. It was true, that no time of commencement was expressed for Jane Richards' annuity. But the daughters' annuities were for twenty-one years "from the testator's decease," and there was to be a proportional payment, if they ended between two quarter-days. Now the daughters could not be intended to receive more than twenty-one years' annuity : the first payment, therefore, must be proportional also. The same provisions applied to all these annuities ; it would be unnatural to separate them, and the true construction was, that they all commenced from the testator's death. There must be a proportional payment only on the first quarter-day.

Wood, V.-C. } ANDERSON v. STAMP.
19, 20 JAN. 1865. }

Practice—Writ of Ne Exeat.

A plaintiff obtained a writ of ne exeat, but did not serve interrogatories on the defendant, who immediately put in a voluntary answer, denying that any debt was due from him to the plaintiff:—

Held, on a motion to discharge the order for the writ, that for the purposes of such motion the defendant must be taken to have answered fully.

Stamp, the defendant in the present suit, had acted as manager in Vancouver's Island of a business carried on in partnership between himself and Anderson. The joint adventure having terminated, Stamp came to England, and on the 12th of November, 1864, instituted the suit of *Stamp v. Anderson*, for an account of the partnership property. Anderson had been interrogated in the suit of *Stamp v. Anderson*, but had put in no answer.

On the 11th of January, 1865, or, as Stamp asserted, on the 5th of January, Anderson learnt that Stamp had taken his passage for America in a packet-boat advertised to sail on the 17th.

On the 16th of January, 1865, Anderson filed the bill in *Anderson v. Stamp*, stating that over 4000*l.* was due to him on the balance of the account mentioned in *Stamp v. Anderson*; that Stamp was about to proceed abroad; and that the plaintiff was thereby in danger of losing his debt. The prayer of the bill was for a writ of *ne exeat* against Stamp, and for general relief: no interrogatories were filed.

On the 16th Anderson obtained a writ of *ne exeat*, on an *ex parte* application.

On the 18th, Stamp put in a voluntary answer, no interrogatories having been then filed.

19 JAN. 1865.

Roll, Q.C., and *Freeling*, this day moved to discharge the order: they argued—

If the defendant can make out a *prima facie* case that nothing is due, the order for the writ must be discharged,

De Carriere v. De Carriere, 4 Ves. 591;

Leo v. Lambert, 3 Russ. 417;

Roddam v. Hetherington, 5 Ves. 91.

The defendant has put in an answer positively denying that anything is due to the plaintiff,

Leo v. Lambert (*loc. cit.*).

The plaintiff ought to have sworn positively to the amount of his debt, and to have stated the facts on which he intended to rely,

Jackson v. Petrie, 10 Ves. 164;

Hovden v. Rogers, 1 V. & B. 133.

If the mode of computing the account be stated, and it appears to comprise unascertained sums, the writ will not be granted,

Flack v. Holm, 1 J. & W. 405;

Boehm v. Wood, Turn. & R. 343.

The facts were all within plaintiff's knowledge, and he ought to have applied for the writ as soon as he knew that the defendant intended to go abroad,

Dick v. Swinton, 1 V. & B. 373.

The bill ought to have prayed for some specific relief.

Giffard, Q.C., and *Druce*, for the plaintiff, argued—

The defendant's answer cannot prevail against the positive affidavit of plaintiff that there is a debt,

Jones v. Alephsin, 16 Ves. 470.

The bill is in the nature of a cross-bill, and it is unnecessary to pray for more than general relief,

Cook v. Martyn, 2 Atk. 3;

Grimes v. French, 2 Atk. 141.

The plaintiff's affidavit, when he swears that the balance of account will be in his favour, is conclusive,

Rico v. Gualtier, 3 Atk. 501.

Freeling, in reply, distinguished cases in which the defendant relies on an affidavit from those in which he has put in an answer.

20 JAN. 1865.

WOOD, V.-C., said, that under the old practice, when the interrogatories formed part of the bill, the defendant had it in his power to put in a complete answer so soon as the bill had been served upon him. If he did not answer fully, the writ could not be discharged; but if he answered fully, the Court looked at his answer to see whether it was proper to discharge the writ, or require security for the debt. In the present instance, the bill was filed under the new practice, and had no interrogatories annexed to it; nor had any interrogatories been since served. The defendant had put in a voluntary answer positively denying that anything was due to the plaintiff, and that answer, for the purposes of this case, must be considered to be a complete answer. The plaintiff ought also to have stated his case more fully in his bill.

For all these reasons, he should discharge the order, with costs.

Wood, V.-C. } THE GINGER MANUFACTORY
20 JAN. 1865. } COMPANY v. WILSON.

Practice—Cross-Examination of Witnesses on their Affidavit.

The 19th rule of Gen. Ord. 5th of February, 1861, does not abrogate the old practice, but is intended to give greater facilities for the production of witnesses.

In this case the defendant had filed affidavits, and the fourteen days during which the plaintiff was entitled (under rule 19, Gen. Ord. of 5th February, 1861) to serve notice upon him to produce his witnesses for cross-examination before the examiner, had

expired on the 5th of October, 1864. Some weeks afterwards the plaintiff, in accordance with the practice previous to the Gen. Ord. of February, 1861, subpoenaed the defendant's witnesses to attend before the examiner, for the purpose of being cross-examined and gave the defendant forty-eight hours' notice of such intention. The witnesses attended before the examiner, but declined to be sworn, on the ground that the time for cross-examination had elapsed.

Giffard, Q.C., and Druce, moved that the defen-

dant's witnesses might be ordered to attend before the examiner to be cross-examined.

Lawson (Cairns, Q.C., with him), contra.

WOOD, V.-C., said he was of opinion that the practice laid down by rule 19, Gen. Ord. 5th February, 1861, was not intended to abrogate the old practice, but to give additional facilities for the production of witnesses, and he accordingly made an order in the terms of the motion, and directed the defendant to pay the costs of the motion.

COMMON LAW.

Q. B. } WERE, Appellant, v. THE JUSTICES
18 JAN. 1865. } OF DEVON, Respondents.

15 & 16 Vict. c. 81, s. 51—Definition of
"County" — Charter - Borough liable for
County and Police Rates.

B. was an ancient borough, having a gallows, pillory, and tumbrell, assize of bread and ale, estreats of writs and pleas of Withernam. James the First by a charter granted to the mayor and recorder of B. jurisdiction over "trespasses, misprisions, and other minor offences, committed within the borough;" but not over "the determination of any treason, murder, or felony, or of any other matter touching the loss of life or limb," and confirmed all privileges, franchises, exemptions, and jurisdictions, which the mayor and burgesses had ever had by charter, or custom, or otherwise, or had lost; but the charter contained no non-intromittant clause expressly preventing the county Justices from interfering with things appertaining to the office of the borough Justices. The borough Justices had always held Quarter Sessions, and tried felonies and misdemeanors, just as the county Justices, and were never interfered with by the latter, and up to 1858 had made rates in the nature of county rates, and no county rate had ever been levied in B. The respondents having assessed B. to the county and police rates:—

Held, that as the charter contained no non-intromittant clause, the borough had no separate jurisdiction so as to make it free from liability to the county and police rates.

The borough of Bradninch having been by the Justices at a General Quarter Sessions of the Peace for the county of Devon assessed to the county rate for general purposes, and also for police purposes, appealed, and a case was stated which showed that—

The borough, parish, and liberty of Bradninch, is

part of the possessions of the county of Cornwall. It is within and entirely bounded by the county of Devon, is a very ancient borough, and is co-extensive with the parish. By two inquisitions of 4 Edw. 1, the jurors respectively certified that "the borough of Braney's" *inter alia*, "has a gallows, a pillory, and tumbrell, assize of bread and ale, estreats of writs and pleas of Withernam, a warren," and other royal liberties. James the First, in the second year of his reign, granted to the borough of Bradneys or Bradninch a charter, by which *inter alia* he declared that the borough "may, and shall be, and remain from henceforth for ever a free borough of itself; and that the mayor, and burgesses, and their successors," shall from henceforth for ever be one body corporate and politic "in deed fact and name," and that the mayor and the recorder for the time being, may, and each of them "may and shall from henceforth for ever be Justices of us, our heirs, and successors, to keep the peace in the same borough;" and that the mayor and recorder for the time being, and their successors, shall "have full power and authority to inquire concerning whatsoever trespasses, misprisions, and other minor offences" committed within the borough, "which ought or might be inquired into before the keepers and Justices of the peace in any county of our kingdom of England, by the laws and statutes of the same kingdom as Justices of the peace, so nevertheless that they do not hereafter in any manner proceed to the determination of any treason, murder, or felony, or of any other matter touching the loss of life or limb," within the borough, "without the special mandate of us, our heirs or successors." The charter, after nominating a recorder, and giving power to the mayor and burgesses and their successors to elect future recorders, granted to the mayor and burgesses and their successors "so many, so great, the like, the same, and similar Courts of Record,

clerks of the Market Assize, and assay of bread, wine, and ale, customs, liberties, privileges, franchises, immunities, acquittances, exemptions, and jurisdictions, whatsoever," which the mayor, &c., "have or hath heretofore, or ought to have had or enjoyed," by reason or force of any charters or letters patent "or by whatsoever other means, right, custom, usage, prescription, or title, heretofore used, had, or accustomed, although the same, or any or either of them, have or hath not been heretofore used or have or hath been abused or misused, or discontinued," or forfeited or lost.

Up to 1858, no county rate had ever been levied in Bradninch, but rates in the nature of county rates were made by order of the borough Justices in Sessions, for the purposes of the borough. And the borough Justices have always held their Quarter Sessions and tried felonies and misdemeanors in the same manner, and to the same extent, in all respects as the Justices of the county of Devon in their Sessions, and the county magistrates did not interfere in any manner or for any purpose within the limits of the borough.

In pursuance of the Militia Law Amendment Act, 1854 (17 & 18 Vict. c. 105), an award was made in 1855, which, after reciting that the borough of Bradninch was one of certain corporate towns not liable by law to the payment of county rates, determined that the borough should contribute to the maintenance of the militia in a certain proportion, and in pursuance of this award an order was made at a Quarter Sessions for the county which, after reciting that the borough was one of such corporate towns before mentioned, directed that the borough should contribute a certain sum for the maintenance of the militia.

The borough has for some years past had a police officer appointed by the borough authorities and wearing a police uniform, in addition to the pariah constables and the serjeant-at-mace, and the general police of the county has not interfered with it.

The questions for this Court are—whether the borough, pariah, or liberty of Bradninch is liable to contribute to the general county rate and to the general police rate for the county, or to either or neither.

In the construction of 15 & 16 Vict. c. 81, the word "county" is by section 51 to mean and "include any riding or division having a separate commission of the peace, or separate county treasurer, and any liberty, franchise or other place in which rates in the nature of county rates may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county or counties at large in which such liberty, franchise or place may lie, nor contributing or paying to the county rates made for such county or counties at large."

Karslake, Q.C. (Lopes with him), for the respondents.

1st. The borough is liable for the county rate. This turns upon the charter of James the First, which con-

tains no non-intromittant clause; viz., "so that the Justices in no manner hereafter may any way intrude themselves, or any one of them may intrude himself, to anything belonging or appertaining to the office of Justice of the Peace within the borough, and the bounds and precincts of the same, by any cause whatsoever arising or happening there, without the special command of us, our heirs and successors, in that behalf obtained." This was the ground of decision in

The Mayor, &c., of East Looe v. The Justices of Cornwall, 3 B. & S. 20.

Bradninch, therefore, has no exclusive jurisdiction. And though the Justices of the borough have held Quarter Sessions, and this Court will not willingly declare that they have all these years exercised a wrongful jurisdiction, yet the charter does not give the power to hold Quarter Sessions, but expressly excludes the power to "determine" felonies,

Rex v. Clarke, 5 B. & Ald. 665;

55 Geo. 3, c. 51;

15 & 16 Vict. c. 81, ss. 2, 6, 51;

21 & 22 Vict. c. 38;

2 B. Just. 204 (ed. 1845).

2nd. The borough is liable for the police rate,

Regina v. Blackmanstone, 8 W. R. 433;

2 & 3 Vict. c. 98;

3 & 4 Vict. c. 88.

Coleridge, Q.C. (Kingdon with him), for the appellant.

1st. As to the county rate Bradninch is not liable, for it is not within "the limit of the commissions" of the county Justices,

15 & 16 Vict. c. 81, s. 21.

From the charter of James the First, and the facts, Bradninch appears to be a county within 15 & 16 Vict. c. 81, s. 51. True this charter has no non-intromittant clause, but the same effect is given by other words conferring on the borough an exclusive jurisdiction. Bradninch had also a "gallows, pillory, and tumbrell," and the "pleas of Withernam" show that the sheriff of the county had no jurisdiction. The county Justices had no jurisdiction when this charter was granted, which seems to recognise and confirm a lost charter or grant.

[COCKBURN, C.J.—Can you put it higher than this, that the borough Justices have concurrent jurisdiction?]

[CROMPTON, J.—Have you any authority that a non-intromittant clause may be presumed though absent?]

The circumstances here raise that presumption. As to the police-rate, that must follow the decision on the county-rate.

COCKBURN, C.J.—We are all agreed as to this case. We cannot draw the inference which Mr. Coleridge draws, and supply what is omitted in the charter of James the First. On the contrary, the silence of the

charter tends to an inference exactly opposite to that which he suggests—to the inference, namely, that the exclusive jurisdiction claimed for the Justices of Bredninch did not exist. They have, therefore, in our opinion, no separate jurisdiction, so as to make the borough separate from the county, and free from liability to the rate which has been made on it. It is, however, a fair subject of discussion, and there will, therefore, be no costs.

CROMPTON and BLACKBURN, JJ., concurred.

Judgment for the respondents.

Q. B. } **PARSONS and Another v. BAGNALL.**
19 JAN. 1865.

University of Oxford—Claim of Conusance.

A rightful claim of conusance over an action in this Court made by the Chancellor of the University of Oxford, will not be refused by this Court merely because only one advocate practises in the Chancellor's Court. Such a claim made the day after the defendant appears to the writ is in ample time.

Mellish, Q.C., on November, 19th, 1864, obtained a rule, calling on the plaintiffs to show cause why a claim of conusance of this action by the Earl of Derby, Chancellor of the University of Oxford, should not be allowed. The affidavits disclosed that the action was for goods sold, &c.; and that the defendant, when the causes of action accrued, was and still continued a resident undergraduate member of the University, and that the causes of action arose and accrued within the liberties of the University; that the writ was served on the defendant on the 12th of November, and that he appeared on the 18th, and that the claim of conusance was made on the 19th; that according to the course of practice of the University Courts of the Chancellor, suitors can only appear and plead by proctors authorised to practise in them, and not by attorneys of the Superior Courts, or barristers; and that long before, and when this action was begun, there had been, and still was, only one proctor practising in those Courts, and that persons suing or sued therein must be represented there by him, and therefore that tradesmen could not safely sue there.

Henry the Eighth, in the fourteenth year of his reign, by letters patent, declared that the Chancellor of the University of Oxford, and his successors, should have the power to hear and determine, *inter alia*, "all accounts, contracts, and all other articles which might fall in fine, or ransom, or in other pecuniary punishment, and all other contracts, pleas, and complaints personal, after what manner soever arising, done or committed within the town of Oxford, the suburbs, hundred, or county of Oxford, or elsewhere within the kingdom of England," where any person who ought to have any privilege of the University should be one of the parties, and should have full conusance and correction thereof,

so that no Justice assigned to hold pleas before the king, or Justice of the Common Bench, or other Judge whatever, should in any sort intermeddle therewith; but that if any such Justice should presume to inquire into them, such Justice should, on the certificate of the Chancellor, supersede such inquiry or process, and that the party should be chastised and punished only before the Chancellor. This charter was confirmed by the statute 18 Elizabeth.

Huddleston, Q.C., and *Fisher*, now showed cause.

The plaintiff's right to have his claim heard by a jury, and decided by a Superior Court, will not be ousted by this Court unless every formality is complied with.

1st. The claim was not entered on the record before motion made. A similar claim was refused in,

Leasingby v. Smith, 2 Wils. 406;

Boot v. Grayham, 1 Barn. K. B. 49, 65;

Paternoster v. Graham, 2 Stra. 810;

2 Tidd's Pr. 731 (9th ed.).

[BLACKBURN, J.—We have it from the Master that the record was here when motion made, he having received it from the Treasury.]

2nd. A claim of conusance is like a plea in abatement, and must be made at the first moment,

Hayes v. Long, 2 Wils. 310;

Regina v. Agar, 5 Burr. 2820.

3rd. Only one proctor practises in the Chancellor's Court, and to send the case there will, therefore, be an absolute denial of justice. The other side ought at least to pay the plaintiff's costs.

Mellish, Q.C., and *Hannen*, in support, were not heard.

COCKBURN, C.J.—The rule must be made absolute. As to the objection, that this Court ought not to remit cases to local and inferior Courts, though it is true that this Court will not stop a cause of action, unless the claim of the local Court is made out, yet here, where the jurisdiction exists, and this right to a claim of conusance is established, we are not to be astute to defeat it. The Legislature has no doubt said that claims in general should be tried in the Superior Courts; but, on the other hand, this local Court may be very useful to decide matters of debt which arise within its jurisdiction, especially such questions as, whether goods supplied to minors are necessities. The question is, what has the Legislature sanctioned? It has sanctioned this claim, and we must let it remain. As to the objection that the claim was not made in time, it appears that it was made the very day after the defendant appeared to this action. The time was really shorter than we could have expected, and we can never say that such a claim must be made between the service of the writ and the appearance to it. As for the costs, how can we order the Chancellor to pay the plaintiff's costs?

Besides, the plaintiffs were wrong in bringing their action here.

CROMPTON, J.—I concur. The only objection which struck me at first, was as to there being only one proctor. But I do not think there is anything in that, for I cannot suppose that the Chancellor's Court would refuse to hear some person if necessary, just as this Court has allowed a person to be heard where no attorney or barrister has appeared. That is, therefore, no ground for discharging the rule.

BLACKBURN, J. concurred.

Rule absolute.

Q. B. } HOWARD, in Error, v.
23 JAN. 1865. } THE QUEEN, in Error.

Coram—COCKBURN, C.J., CROMPTON, BLACKBURN, and MELLOR, JJ.

16 & 17 Vict. c. 32, s. 3—*Indictment—Assignment of Error—Want of joinder in Error—Judgment of Reversal.*

Where a writ of error is brought upon a conviction on an indictment for misdemeanor, and the plaintiff in error moves to enter a judgment of reversal for want of a joinder in error, the Court will, in the first instance, grant only a rule nisi under 16 & 17 Vict. c. 32, s. 3.

The plaintiff in error had been found guilty of a misdemeanor, and sentenced to imprisonment on an indictment under 24 & 25 Vict. c. 100, s. 49, for having by false pretences procured a girl under twenty-one years of age to have illicit connection with him. The count not alleging what the false pretences were, error was brought by the plaintiff in error, but there was no joinder by the Queen.

16 & 17 Vict. c. 32, s. 3, says, "Whenever any writ of error shall be brought under the provisions of the said Act (8 & 9 Vict. c. 68) for reversing any judgment in misdemeanor, and error shall be assigned thereon, no judgment of reversal shall be entered, either for want of a joinder in error or otherwise, without the special order of the Court in which such writ of error shall be pending, pronounced in open Court, and upon a certificate, signed by or on behalf of the Attorney or Solicitor-General, that notice has been given to one of them of such intended application, and in the event of there being no joinder in error, such Court of Error may proceed to examine the record in error, and may give such judgment thereon as the Court, from which error is brought, ought to have done, although no joinder in error may have been filed."

Orridge moved to enter a judgment of reversal for the plaintiff in error, for want of a joinder in error, upon an affidavit that notice had been given to the Solicitor-General, and his certificate in accordance with the above Act; and said the application was novel.

[BLACKBURN, J.—Under section 1 of 16 & 17 Vict. c. 32, must not the plaintiff in error be present in Court?]

COCKBURN, C.J.—We are clear this can only be a rule nisi in the first instance, for otherwise the prosecutor and the prisoner might agree to compromise the case, and so defeat the object of the statute and the ends of justice. The statute only gives us power to pronounce judgment after examining the record. This rule must be served on the officer of the Court, and on the real prosecutor, and must be drawn up to follow the words of the statute—"to show cause why the Court should not examine the record," &c. The plaintiff in error should be present in Court when cause is shown.

CROMPTON, J.—If you cannot find the real prosecutor, you should serve the rule on his attorney.

Rule nisi.

C. P. } FALK v. FLETCHER.
16 JAN. 1865. }

Charter-party—Same person Charterer's Agent and Vendor—Mate's Receipts—Bill of Lading—Passing of Property—Evidence of Conversion.

M chartered defendant's vessel at Liverpool to carry salt to Calcutta. Plaintiff acted as vendor of the salt, and also as M's agent in shipping it, and took mate's receipts in his own name. During loading, M stopped payment. Plaintiff refused to complete loading, and demanded from defendant the salt already shipped, or a bill of lading in exchange for mate's receipts, or on payment of freight. Defendant refused, filled up the vessel on his own account, and sailed with the salt to Calcutta. In the ordinary course of business between the parties, plaintiff, on completion of loading, obtained a bill of lading in exchange for the mate's receipts, and sent it to M, who then accepted a bill of exchange in payment. Plaintiff having sued defendant in trover for the salt, the Judge told the jury, that defendant's sailing with the salt, and refusing a bill of lading was ample evidence of conversion, if they thought the property in the salt remained in plaintiff at the time of the sailing; and that the holding the receipts in his own name by the plaintiff was prima facie evidence of his intention to keep a control over the goods, but might be rebutted by the other circumstances and the course of business:—

Held, that the direction was right, and that a verdict for the plaintiff should not be disturbed.

Action tried before Blackburn, J., and a special jury at Liverpool,

Verdict for the plaintiff, damages 582l. 18s. 6d.

The learned Judge stayed execution, stating that it

was a fair case for an application for a new trial to see whether his ruling was right or wrong.

Edward James, Q.C., now moved for a new trial, on the grounds (*inter alia*) of

1st. Misdirection.

2d. Verdict against weight of evidence.

3rd. Damages excessive.

The plaintiff was a salt merchant, and the defendant a shipowner.

The action was in trover for 1007 tons of salt, shipped on board the defendant's vessel, to Calcutta, under a charter-party. For several years the plaintiff had dealt with one De Mattos. De Mattos used to take up ships on charter-party to export salt. The course of business was this. When De Mattos took up a ship or charter-party, a copy of the charter-party was placed in the hands of the plaintiff, who then shipped the salt. In all these transactions the plaintiff acted both as agent for De Mattos, and as vendor of the salt. As he shipped the salt, the plaintiff took the mate's receipts in his (plaintiff's) own name, and afterwards obtained in exchange for them a bill of lading for the whole. Plaintiff then used to transmit the bill of lading, made out in his own name and indorsed to De Mattos, with the invoice which included commission to De Mattos, together with a draft of a bill at four months, which was then accepted by De Mattos. Such being the usual course of business, De Mattos on the 12th of November, 1863, took up the defendant's ship, "The Savoir Faire," by charter-party, to take a cargo of salt to Calcutta. A copy of the charter-party was given to the plaintiff as agent for De Mattos.

By this instrument, made between defendant and De Mattos, freight was to be paid on unloading and right delivery, one third by freighter's acceptance at four months from the final sailing of the vessel . . . and the remainder on the right delivery of the cargo agreeably to bills of lading in cash, &c. It contained on the margin the words, "The captain is to apply to Mr. H. E. Falk (the plaintiff) for cargo and custom house business." A contract for a supply of salt "free on board" was then made on the usual terms between the plaintiff and De Mattos. The plaintiff then, according to contract, began as usual to load a cargo of salt on board the vessel, taking the mate's receipts in his own name as he went on. While the vessel was being loaded, and when 1,007 tons had been shipped, De Mattos stopped payment. The plaintiff thereupon declined to ship any more salt. The defendant informed De Mattos of this by letter, but received no reply. The plaintiff appealed to the defendant to help him and preserve his (plaintiff's) property in the salt, asking him first to permit him to fill up the vessel with salt on his own account; secondly, to purchase the salt; or, thirdly, to give him (plaintiff) a bill of lading on payment of freight, all which offers were refused by the defendant, though it appeared

that the latter offered to give the bill of lading if freight had been paid in cash. The defendant then filled up the vessel on his own account, and sailed with the salt on board about the 24th of December to Calcutta, where the 1,007 tons of salt were housed in the defendant's name, and orders were given for their sale. Both before and after the sailing of the vessel, plaintiff demanded the bill of lading at Liverpool in exchange for the mate's receipts which was refused. A demand was subsequently made in Calcutta on behalf of the plaintiff for the 1,007 tons of salt on payment of freight. This was also refused.

The defendant contended, that under these circumstances delivery on board was an absolute passing of the property to De Mattos, who had the sole interest in the ship, and consequently that there was no property in the plaintiff to support the action.

The defendant also contended, that there was no evidence of conversion, as in conveying the goods to Calcutta he was only doing what he was employed to do under the charter-party, and it did not appear that the salt, which was the subject of the action, had been actually sold in Calcutta.

The learned Judge left it to the jury to say whether the property in the salt still remained in the plaintiff at the time of the sailing. He said there was no doubt that, on the plaintiff's asking for those goods, and for a bill of lading for them, the defendant sailed away with them refusing the bill of lading, which would be ample evidence of a conversion of the goods here in Liverpool, provided they still remained the plaintiff's goods. He further ruled that the plaintiff's holding of the mate's receipts in his own name was *prima facie* evidence of a right and intention on the plaintiff's part to keep a control over the goods, and to receive the bill of lading in exchange for the receipts. But that if the jury should think, from the whole circumstances and the course of dealing between the parties, that the receipts were only by accident in the plaintiff's name, and were really signed with an intention on the part of the plaintiff to give De Mattos the control over the goods, the *prima facie* evidence would be rebutted. The main question, therefore, left to the jury was, whether at the time of the conversion, the plaintiff had the right to the possession of the goods as against De Mattos; which they found in the affirmative.

The question as to the excess of damages was unimportant.

The judgment of the Court, so far as it referred to the points above stated, was as follows:—

ERLE, C.J.—I think there should be no rule. The plaintiff was in reality an unpaid vendor. He supplied goods as agent for De Mattos, but he was really an unpaid vendor. It is said that he was to deliver the salt free on board, but as he had the mate's receipts in his own name, it was a proper question for the jury whether he meant to vest the property in De Mattos,

or to keep the control over it for his own charges. The jury finding that the property did not pass absolutely to De Mattos, it follows that the plaintiff had the control over it. Then, as to the conversion, I think the jury rightly decided what it was for them to decide, that the goods in which the plaintiff was interested were absolutely lost to him, and so that the sailing away was a conversion. As to the time of the conversion, I think the Judge was right in saying it must refer back to the time when the goods were wrongfully taken out of the plaintiff's control, viz., at Liverpool.

WILLIAMS, J.—I am of the same opinion. It was a pure matter of fact for the jury what was the nature of the plaintiff's interest on his placing the goods on board. There was evidence for the jury to find either way. One point to be taken into consideration was, that the plaintiff was agent to De Mattos as well as vendor. No doubt that was pressed on the jury for the defendant, but there was quite sufficient evidence for them to find the other way, viz., that he meant to keep the control. I think, also, that there was no misdirection as to the conversion. The time of conversion was as soon as the plaintiff was deprived of his right to resume possession of the goods.

WILLES, J., concurred, and referred to,
Key v. Cotesworth, 7 Exch. 595 ;
Turner v. Trustees of the Liverpool Docks, 6 Exch.
 543 ;
Feise v. Wray, 3 East, '93.

KEATING, J., concurred.

Rule refused.

C. P. } SCOTT, Appellant, v. DURANT,
 17 JAN. 1865. } Respondent.

REGISTRATION APPEAL

Appeal from Revising-Barrister—Non-compliance with 6 Vict. c. 18, ss. 42-45—Case signed after 31st of October.

A revising-barrister for a borough, at his Court held on the 28th of October, promised to grant a case for a consolidated appeal, and that the respondent's attorney should have an opportunity of raising in it a point which he had made, and which had been overruled; the barrister, without adjourning the Court, asked the parties to come to his chambers, which were out of the borough, to settle the case. It was agreed that all formal objections should be waived, and accordingly the directions of sections 42-45 of the Registration Act were not followed. On the 4th of November the case was drawn, but the respondent refused to sign it, as it had not been submitted to his attorney, and did not raise the point made by him. On the 5th of November the barrister signed the case:—

Held, that there was no complete appeal before the Court, and that the case must be struck out of the list.

Rule calling on the appellant to show cause why this case should not be struck out of the list of appeals in this Court from the decisions of revising-barristers, on the grounds, that there was no notice in writing given by or on behalf of the said appellant before the rising of the revising-barrister's Court; that the revising-barrister did not state the case or his decision, or read the statement, or indorse or sign it in open Court, or as required by the statute 6 Vict. c. 18, s. 42; and that the requisitions of the 44th section of the said statute were not complied with; and that no declarations were signed, and no respondent or appellant appointed, as required by the said last-mentioned statute; and that Durant was improperly entered as the respondent.

The facts were, that at the Court of the revising-barrister for the borough of New Windsor, held on the 21st of October last, a Mr. Rogers, of Reading, as attorney for Durant the respondent, raised certain objections to retaining on the register the names of Scott the appellant and others. The revising-barrister took time to consider, and adjourned his Court to the 28th of October, when he gave his decision in favour of Rogers on one point, and against him on the others, and struck out the names: he was then asked for a case, which he said he would grant; but as it was towards the end of the day, and there was a considerable pressure of business, it was agreed that all objections in point of form should be waived, and that the respondent should appear to answer the appeal with a view to getting the decision of this Court; and Durant stated in open Court that he would appear as respondent, and that the appeals might be consolidated. The revising-barrister said that Rogers should have an opportunity of stating the objections which he had raised and which had been overruled, and without adjourning the Court asked the parties to come to his chambers (which were out of the borough) to settle the case. Nothing more was done till the 4th of November, when Long, the appellant's solicitor, brought a draft of the case to Durant, and he took it over to Reading to submit it to Rogers, who however was absent from home. Durant had struck out part of the case, and told Long that was all he objected to: but he afterwards refused to sign it, as it had not been seen by Rogers, and as a point raised by Rogers was not raised in it. On the 5th of November, the last day on which it could be done, the barrister signed the case, at the same time telling the appellant that he took it at his peril; and Long the same day gave a copy of it to Durant.

By the 62nd section of the Registration Act (6 Vict. c. 18), the appellant must, in the first four days of Michaelmas Term, transmit the statement signed by the barrister to the Masters of the Common Pleas.

Under these circumstances the above rule was obtained, and

Sawyer, now showed cause against it.

It was agreed that the formalities required by 6 Vict. c. 18, ss. 42—45, should be dispensed with. The provisions of these sections are directory merely, and not imperative, and they were dispensed with by consent. There are no negative words in them: but in sections 62 and 64 there are negative words, and, consequently, they are imperative,

Autey v. Topham, 5 Man. & Gr. 1.

It will be said that consent cannot give jurisdiction, and *Knowles v. Holden*, 24 L. J. Ex. 223, will be relied on. But there were negative words that there should not be jurisdiction, and it is not like a case where there is jurisdiction at first which is afterwards extended by consent of the parties,

Andrews v. Elliott, 5 El. & Bl. 502.

Under the 43rd section Durant ought to have signed the case, and been respondent; but as he did not decline in writing to be respondent, the barrister could not name any one else as respondent; and therefore signature under section 44 became unnecessary. The barrister is to hold his courts between the 15th of September, and the 31st of October (section 33), and section 41 gives a power of adjournment, "so that no such adjourned Court shall be holden after the last day of October in any year." But that applies to the regular business of the Court, and not to signing a case.

Agnew v. Fowler, 1 Ir. C. L. Rep. 462, is as to signing a case after the time for holding registry sessions, and under a different Act, and does not apply; besides, there was in that case no consent. The barrister may sign anywhere, and *nunc pro tunc*.

[KEATING, J.—In *Whithorn v. Thomas* (7 Man. & Gr. 1) I was the revising-barrister, and signed the amended case in this Court.]

Pring v. Estcourt, 4 C. B. 71;

Freeman v. Reed, 30 L. J. M. C. 123; 9 C. B. (N. S.) 301;

Regina v. Mayor of Rochester, 7 El. & Bl. 910;

Regina v. Justices of Hants, 3 N. R. 487; 33 L. J. M. C. 104.

Griffiths, in support of the rule.

There was no consent to the case as now stated. There was no written notice of the desire of the parties struck out to appeal: the barrister did not state the facts and his decision in writing, nor read such statement in open Court to the appellant, and then and there sign it: the appellant did not make the written declaration required by the 42nd section; the barrister did not make and sign the indorsement on the statement, nor deliver the statement with such indorsement to the appellant as required by the same section; and he did not declare the appeals consolidated, nor appoint a respondent as required by section 44. There is no power of adjournment after the last day of October. A condition annexed to a right of appeal is

a condition precedent; and the requisitions of the statute cannot be waived by consent; and if they can, there was no consent.

ERLE, C.J.—A great many points have been made in this case. But we are bound to give our judgment in Mr. Griffiths' favour, on the ground that the appeal is not complete, and therefore not before us.

WILLIAMS, WILLES, and KEATING, JJ., concurred.

Rule absolute to strike the appeal out.

C. P. } FREEMAN, Appellant, v.
17 JAN. 1865. } GAINSFORD, Respondent.

REGISTRATION APPEAL.

Forty Shillings Freehold—Shares in Music Hall—Share in Profits.

The proprietors of a music hall by deed vested it, and the power of management, in trustees, reserving to themselves no direct interest in the land or property, but only a right to proportionate shares of the profits. The deed, which was executed by the claimants, though not by all the proprietors, stipulated that it should bind those who did execute it:—

Held, that the claimants had no such equitable interest in the land as entitled them to be registered:

Held also, that they could not raise the objection that the deed was inoperative till executed by all the proprietors.

The following case was stated by the revising-barrister for the West Riding of Yorkshire:—

"Thomas Hadfield objected to Charles Stanley, as not having been entitled, on the last day of July, 1864, to have his name retained in the list of voters for the township of Sheffield, in and for the West Riding. In the copy of the register relating to the township of Sheffield Stanley's place of abode was stated to be '31, Throgmorton Street, London;' the nature of his qualification, 'freehold shares;' place in township, 'Music Hall, Surrey Street.' By a deed, made on the 2nd day of October, 1828, certain persons became entitled to undivided freehold shares in the Sheffield Music Hall, and claimed to be on the register of voters, and it was admitted that the provisions of that deed were such as to qualify them to be there. A subsequent deed, dated the 19th of June, 1864, was prepared, a copy of which is appended to, and is to be read and taken as a part of this case. It was agreed that the income received by the claimant, and by each of the other four claimants after mentioned, is in annual amount sufficient to qualify, if the Court should be of opinion that he and they are in other respects duly qualified and entitled to remain on the register. This deed was, previous to the 31st of July last, executed by but thirty-two of the proprietors of shares in the Music Hall, they being proprietors of 110 out of the whole 184 shares. There are twenty-five other pro-

proprietors, by whom it was not then executed: by some small number of them it has since been executed. The present claimant, and the four other claimants after-named, had however all executed this deed previous to the 31st of July last, as also had all the new trustees.

"It was contended for the claimant, that the second deed, of the 13th of June last, had not yet come into operation, so as to constitute a new body of trustees; and inasmuch as twenty-five proprietors, representing seventy-four 184th shares, have not yet executed the deed, that, until the whole had signed, no trustees thereunder are effectually appointed, and the rights of those who have not are not affected by its provisions. It was also urged that the said deed could not operate in any way until it had been executed by all the shareholders, and that the only deed before the Court was the original deed of 1828.

"It was also argued on behalf of the claimants, that, even if the effect of the deed of the 13th of June was to create a body of trustees for the purposes therein named, such creation would not destroy the equitable freehold interests of the claimant and his co-proprietors in the Music Hall.

"For the respondent it was argued, that the proprietors being resident in various distant places, and inasmuch as it would in all probability be long before the deed of 1864 could be executed by all of them, the 32nd clause of that deed was inserted for the very purpose of making the deed valid and effectual as to the shares of those who from time to time executed it, even although not executed by all the proprietors; that all the present claimants had executed the deed of 1864, and that their shares were therefore liable to the operation of it: that each proprietor of an undivided 184th share was competent to execute a deed declaring trusts respecting his share, and that on the execution of such deed his share would be liable to such trusts; that what one could do without the concurrence of any intermediate number of proprietors, he could do without the concurrence of all, and bind his own shares as effectually as all the shares would be bound by the execution of all, and that in this instance a majority of the shareholders, holding a majority of the shares, and all the new trustees had executed the deed of 1864, and they had therefore practically the power and control in their hands.

"Under these circumstances I was of opinion that the claimant ought not to have been on the register, and expunged his vote. If the Court should be of opinion that the said Charles Stanley, and the other claimants, are not disqualified under the provisions of the said deed of the 13th of June, 1864, the register should be amended by the insertion of their names; but if the Court should be of opinion that they are disqualified by that deed, then the register should remain as amended by me.

"This is a consolidated appeal of five cases, which all depend on the same decision, and I hereby appoint

John Freeman a party interested, and consenting to appear for the appellants, to prosecute the said appeals; and I appoint John Gainsford in like manner to be respondent in the said appeals."

Then followed the names and particulars of the qualification of the several parties to the consolidated appeal.

The deed of the 13th of June, 1864, was made between the proprietors of the Music Hall, whose names and seals were affixed, of the first part, and trustees of the second part; and after reciting the deed of 1828, vesting the fee of the Music Hall in trustees for the proprietors, and a subsequent mortgage under the powers of that deed, contained in its operative part a mutual agreement between the parties thereto, that the Sheffield Music Hall, and the shares, estates, and interests therein of the parties of the first part, should be governed by the rules thereafter appearing, numbered 1 to 33.

The following provisions were made by the rules which are material to this case:—

1. "The parties hereto of the second part, their heirs, assigns, and successors, shall have the several powers hereinafter appearing, and distinguished by the letters A to L."

A.—"To vest or cause to be vested the fee simple and inheritance of the Sheffield Music Hall in themselves, or any of their body for the time being, or in such person or persons as the trustees shall think proper."

C.—"To grant leases from year to year.

D.—"With such consent as mentioned in rule 7 to grant leases greater than from year to year.

E.—"With like consent to enlarge the buildings and acquire additional land.

G.—"With like consent to make new mortgages in fee or otherwise, up to a certain amount.

H.—"With like consent to sell.

I.—"Generally, in all matters not hereinbefore specified, to deal with and manage the Sheffield Music Hall as if the trustees were the absolute beneficial owners thereof."

K.—"To receive the rents and annual profits.

5th. "Out of the rents and annual profits in the nature of income and not capital the trustees shall annually, or oftener if they think fit, declare a dividend, which shall be divided amongst the proprietors according to their respective shares in the Sheffield Music Hall;" with power to the trustees to form a reserved fund of not more than 500*l.*, to rank as capital till appropriated, and be invested on certain securities, the income from which shall rank as income from the Sheffield Music Hall.

6th. Capital in the hands of the trustees, and not otherwise applicable under this deed, to be divided amongst the proprietors according to their shares.

7th. The powers given under letters D, E, G, and H, to be exercised "with the consent of the proprietors, testified by the resolution of a special general

meeting of them, or by writing under the hands of such number of proprietors as shall represent two-thirds of the shares."

11th. A register of names, &c., of proprietors to be kept, and all future transfers to be registered therein.

13th. Transfers *inter vivos* to be in a given form, or such other form as the trustees shall approve. The form given being, "I, . . . of . . . , being the proprietor of the share No. — in the Sheffield Music Hall," &c.

25th. Resolutions carried by a majority of the votes of the proprietors present at a meeting of proprietors shall be binding.

32nd. "If all the proprietors of shares in the Sheffield Music Hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same, and the same proportion of majorities of the parties who do so execute shall bind the whole of them as are hereinbefore appointed to bind the whole body of proprietors."

Cleasby, Q. C., for the appellant.

The deed of 1864 does not take out of the shareholders the equitable interests they previously enjoyed; it does not affect the property, but was only intended to alter the management. The shares are shares in the thing itself, and not merely in the rents and profits, so that there is no ground for bringing this case within

Bennett v. Blain, 3 N. R. 124; 33 L. J. C. P. 63.

The deed is inoperative without the consent of all the proprietors, notwithstanding rule 32.

Hannen, for the respondent.

Under the old deed the legal estate passed to the mortgagees, subject to be reconveyed to the trustees; and the interests of the *cestuis-que-trust* must be ascertained by what they have agreed to take under the present deed. They cannot under it call on the trustees to hand over to them any specific part of the rents, but only their proportionate share of the profits. In *Bennett v. Blain* it could not be the agreement that the shares should be personalty which made them so. On the second point the 32nd rule is conclusive.

Cleasby, in reply, cited

Baxter v. Brown, 7 Man. & Gr. 198.

ERLE, C.J.—I am of opinion that the revising-barrister was right. The provisions of this deed and the one in *Bennett v. Blain* seem to me to have the same substantial operation, and to produce the same effect. The law laid down there by my Brother Williams, that under deeds like this the shareholder has no direct interest in the land, but only a right to a share of the profits, is binding law.

As to the other point, that some of the proprietors had not executed the deed, I think that argument is not available for the appellants, on account of the 32nd clause, which clearly precludes them from the benefit of it.

WILLIAMS, J.—I am of the same opinion. *Bennett v. Blain* is quite applicable. The principle is, that the trust on which the equitable claim in question is founded gives no direct right to any portion of the receipts, but only to a proportionate share of the profits. A long series of cases as to whether this sort of property is real or personal estate within the statutes of Mortmain have been based on that principle. It is impossible to say that the judgment of the revising-barrister was wrong.

WILLES, J.—I take for my judgment the words of my Brother Williams in *Bennett v. Blain*, where he says, the principle is that "a shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits."

KEATING, J.—It is impossible to distinguish in principle between this case and *Bennett v. Blain*.

Judgment for the respondent.

C. P.

21 NOV. 1864. } LANGMEAD v. MAPLES.
18 JAN. 1865. }

Estoppel—Decision of same facts by Court of Chancery—Reservation of Right to proceed at Law—Roll's Act, 25 & 26 Vict. c. 42.

To a declaration for injuring a wall, and obstructing lights, defendant pleaded in bar by way of estoppel, "That after the passing of the Chancery Regulation Act, 1862, the plaintiff commenced his suit in the High Court of Chancery against the defendant for the very same rights, claims, and causes of action . . . and the Court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant, and the said judgment and decree still remain in force. Replication, "That the Court of Chancery, dismissing the said bill of the plaintiff in the plea mentioned, reserved to the plaintiff the right of proceeding at law for the causes of action alleged, and ordered the said bill to be dismissed without prejudice to such right:"—

Held, First. That the plea was good; Second. That the replication was good.

Declaration—1st count.—For injury to the plaintiff's reversion in a certain wall, by building upon and against it.

2nd count.—For injury to the plaintiff's reversion in certain dwelling-houses by obstructing lights.

3rd count.—For trespass to a certain wall of the plaintiff. Claim of an injunction.

8th plea, to the first count.—That the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he says that after the accruing of the causes of action in the first count alleged, and after

the passing of the "Chancery Regulation Act, 1862," the plaintiff commenced his suit and filed his bill in the High Court of Chancery, against the defendant, and impleaded the defendant therein for the very same rights, claims, and causes of action as in the said 1st count alleged, and such proceedings were thereupon had in the said suit, that before the commencement of this suit the said Court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment, and decreed in respect thereof in favour of the defendant, and the said judgment and decree still remain in force.

9th plea.—The same to the second count.

10th plea.—The same to the third count.

2nd replication to the 8th plea.—The plaintiff says that he ought to be permitted to implead the defendant in respect of the causes of action in the 1st count alleged, because he says that the said Court of Chancery dismissing the said bill of the plaintiff in the said 8th plea mentioned, reserved to the plaintiff the right of proceeding at Law for the causes of action in the said 1st count alleged, and ordered the said bill to be dismissed without prejudice to such right, and this the plaintiff is ready to verify; wherefore he prays judgment that he ought to be permitted to implead the defendant in respect of the causes of action in the said 1st count alleged.

3rd replication similar to the 10th plea.

4th replication (added in the course of the argument), similar to the 9th plea.

Demurrer to the defendant's 8th, 9th, and 10th pleas, and joinder in demurrer.

Demurrer to the plaintiff's 2nd, 3rd, and 4th replications, and joinder in demurrer.

Plaintiff's points for argument on demurrers:

1st. That the Chancery Regulation Act, 1862, does not affect any legal remedies, but merely provides that in respect of any equitable relief or remedy sought in the Court of Chancery, that Court shall determine any question of law or fact upon which the right to such equitable relief or remedy may depend.

2nd. That it is possible that the Court of Chancery may have determined in favour of the defendant, on grounds which do not at all concern or negative the legal right of the plaintiff, or his right of action.

3rd. That the determination in favour of the defendant may have been upon such grounds as are mentioned in the 4th section of the Act,—viz., that such matter had been improperly brought into Equity, and that the same ought to have been left to the sole determination of a Court of Law.

4th. That it is not possible consistently with the nature of the causes of action, and the respective jurisdictions of the Court of Chancery and a Court of Common Law, that the plaintiff should have impleaded the defendant in Chancery for the very same rights, claims, and causes of action as alleged in the declaration, as that the Court of Chancery should have

determined such causes of action in favour of the defendant.

5th. That even if the defendant's pleas are *prima facie* good, the replications demurred to are good, as virtually denying the defendant's pleas, and as showing that the Court of Chancery did not so determine the causes of action in favour of the defendant, as to prevent the plaintiff from maintaining the action in respect of those causes of action.

Defendant's points in support of the pleas.

1st. The declaration only raises such questions of law and fact as are shown by the pleas to be the same as those submitted to the Court of Chancery for the administration of that Court at the instance of the plaintiff.

By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), extending the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), that Court was not merely empowered, but absolutely bound, to inquire into and determine those facts, and also every question of Law incidental thereto, the same being questions of law and fact, in which the plaintiff's title to relief depended.

The pleas show that the said Court did in due course determine those matters of law and fact in the defendant's favour.

The defendant will contend that the matter of law and fact attempted to be tried in this action having already been so determined by the Court of Chancery, the plaintiff is estopped from trying the same matter of law and fact over again in this action.

2nd. Defendant's points in support of the demurrers to the replications to the 8th and 10th pleas.

The plaintiff does not by his replications deny that the questions of law and fact, attempted to be tried in this action, have been already tried and determined by the Court of Chancery at his instance as shown by the 8th and 10th pleas, nor does he allege that his bill was dismissed on any ground than that the Court of Chancery determined those questions of law and fact in favour of the defendant, but merely shows that, although the Court determined those questions in favour of the defendant, yet the Court affected to reserve to the plaintiff the right to proceed at Law.

The defendant will contend that the Court of Chancery having once determined the questions of law and fact, could not give any power or right to the plaintiff to try the same questions over again in this action.

Lush, Q.C. (Henry James with him), for the plaintiff.

The plea is bad. It need only mean that the bill was dismissed on other grounds. The principle of estoppel is discussed in

Duchess of Kingston's Case, 2 Sm. L.C. 669 (5th ed.). Even if the plea is good, the replication is a good answer to it. The Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), does not prevent the Court of

Chancery from dismissing a bill without prejudice to a plaintiff's right to go to a Court of Law.

Rochfort Clarke, for the defendant.

The plea is good. Rolt's Act (the Chancery Regulation Act, 1862, 25 & 26 Vict. c. 42), requires the Court of Chancery, except in special cases, to do what Cairns' Act (the Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27) allowed.

[WILLES, J.—You must argue, that, failing the equitable remedy, the Court must still go on to decide the facts so as to bind the plaintiff afterwards.]

No. But here the plea expressly alleges that the Court of Chancery did decide the facts. The replication is bad, for it admits the adjudication upon these facts, and then alleges a reservation which is inconsistent with them. He cited,

Young v. Fernie, 3 N. R. 270; 12 W. R. 221.

The plaintiff might have new assigned.

ERLE, C.J.—I think the replication is good. For the present we may take the plea to be good. On the traverse of it, the defendant must show a final judgment, intended to be an adjudication upon the causes of action. In effect the replication substantially traverses the main point of the plea, namely, that there was a final adjudication of the facts in question in favour of the defendant. The reservation prevents the judgment from being a final adjudication, and makes it only an *ad interim* adjudication, leaving the plaintiff his right at Law. It has been said, that Cairns' and Rolt's Acts make the replication bad, and that a decision of the Court of Chancery is a final judgment as in a Court of Law. But I take the judgment of the Lords Justices in *Swaine v. Great Northern Railway Company* (33 L. J. Ch. 399), to be contrary to Mr. Clarke's contention. There the Vice-Chancellor dismissed the bill. The matter was taken on appeal before the Lords Justices, and they decided that it was not a case for an injunction in the Court of Chancery. A question was raised, whether it was not the duty of the Court to go on and decide as to damages. Lord Justice Turner referred to *Johnson v. Wyatt* (3 N. R. 270; 33 L. J. Ch. 394), and said, "Under Rolt's Act, it was not compulsory for the Court to exercise jurisdiction." In *Swaine v. Great Northern Railway Company*, therefore, the bill was dismissed expressly without prejudice to the right of the plaintiff to bring any action which he might have a right to bring at Law. In *Johnson v. Wyatt*, the Court finally decided as to the damages, but Lord Justice Turner was not satisfied that the Court was bound, under Rolt's Act, to enter into that part of the case. On the authority of these cases, and the construction of these statutes, I am clearly of opinion that the replication is good.

WILLIAMS, J.—I am of the same opinion. I think the plea is sufficiently answered by the replication. I think the plea is good, because it avers in so many words that the Court of Chancery decided these very

points in favour of the defendant. The cases referred to by my Lord show that the Court of Chancery might so determine, but that it was at their discretion to do so or not. The replication, which on demurrer must be taken as true, shows that the allegation of the plea is not well founded. It appears that the Court of Chancery did not exercise this right of decision as they might have done, but thought proper to reserve the question for a Court of Law. I think, therefore, that the replication negatives the allegation that the Court of Chancery determined these causes of action. Substantially what the Court of Equity thought right was for the plaintiff to proceed at Law.

WILLES, J.—I am of the same opinion. The defendant pleads that this same matter was finally adjudicated upon by a Court of competent jurisdiction. I was at first disposed to think the plea bad, because when the matter was brought before the Court of Chancery it may or may not have been decided, and the Court of Chancery may have considered on equitable grounds that it was not a case for an injunction, and may have declined to go into the question of the plaintiff's right; and may have seen their way to say that the damages would be better discussed in a Court of Law, and so given the go-by to these points. But looking at the averments in the plea, that the Court of Chancery had determined these causes of action in favour of the defendant, I think the Court must be taken to have decided on the merits, though the evidence may alter the case. The dismissal of the bill may have been upon grounds peculiar to the Court of Chancery; but, looking to the form of the plea, I think it is good. But the replication changes the aspect of the case. It avers that the Court of Chancery reserved to the plaintiff his right to bring an action at Law. It thus becomes clear that the condition of every plea of this kind being good is removed, because there was no final adjudication. So the replication is good.

KEATING, J.—I am of the same opinion. The strength of Mr. Clarke's argument depended on his construction of 25 & 26 Vict. c. 42, which is, that the Court of Chancery had no jurisdiction to do that which the replication says they did. But the cases cited by my Lord show that the Court of Chancery had a right to do so. If so the replication is good. I think the plea good, and the replication good.

Judgment for the defendant on the demurrer to the pleas, and for the plaintiff on the demurrer to the replications.

C. P. } HOGG v. SKEN.
19 JAN. 1865.

Bill of Exchange—Acceptance by one Partner in Fraud of the other—Burden on Holder of proving Value.

H drew a bill on V and S, partners, and V accepted

it in the partnership name for a debt of his own in fraud of S, and on both partners being sued by an indorsee, V suffered judgment by default. S pleaded non accepit, and at the trial produced the partnership deed, which stipulated that V should not accept in the partnership name:—

Held, that, as the bill was tainted with fraud in its inception, the indorsee must prove that he gave value.

Musgrave v. Drake (5 Q. B. 185), commented on, and distinguished.

The plaintiff sued as indorsee of a bill of exchange drawn by Hodgkinson on Vincent & Skeen (who were partners), accepted in their name, and indorsed by the drawer to R, and by him to the plaintiff. Vincent not appearing, judgment was signed against him by default, and the plaintiff went on against Skeen, who traversed the acceptance.

In fact, Vincent accepted the bill in the partnership name for a debt of his own, and at the trial before Willes, J., at the Guildhall, Skeen produced the partnership deed, which stipulated that partnership bills should be accepted by Skeen alone, and a verdict was taken for the defendant.

C. Pollock obtained a rule to set aside this verdict, and enter it for the plaintiff, according to leave reserved, on the ground that, as there was no evidence as to notice to the plaintiff, or of want of consideration, he was entitled to the verdict.

Griffiths showed cause, and contended that the onus lay on the plaintiff of showing that he gave value.

[WILLES, J.—It must be taken that the jury found no value was given.]

C. Pollock was then called on to support the rule.

The defendant's evidence was simply that the bill was accepted in fraud of the partnership articles, and no proof was given of the circumstances under which the plaintiff took. There is a distinction between a bill that is fraudulent in its inception, in which case the indorsee is put to proof that he gave value, and a bill that is only fraudulent as between partners,

Musgrave v. Drake, 5 Q. B. 185;

Grant v. Hawkes, reported only in Chitty on Bills, 32 n. (10th ed.).

There the plaintiff is not affected by notice of the fraud; and if it is held that he must prove he gave value, Musgrave v. Drake must be overruled.

ERLE, C.J.—I am of opinion that this rule should be discharged. It is an action by an indorsee and holder of a bill of exchange against the acceptor, and, on a plea denying the acceptance, the evidence was that one partner accepted in fraud of the other. On that evidence the question is, whether the burden is thrown on the plaintiff of showing he gave value. It is established by a long course of cases, that, where a bill is tainted with fraud in its inception, the onus is thrown on the holder of proving that he, or some

one under whom he claims, gave value for it. Where one partner, in fraud of the others, accepted in the name of the firm, and issue was joined on a plea of non accepit, the Queen's Bench held, in Musgrave v. Drake, that on those pleadings, and on proof of acceptance by one partner competent to bind the firm, the plaintiff would be entitled to succeed without proof of the circumstances under which he took the bill, if he were not affected with knowledge of the fraud. But that judgment turned entirely on the effect of the plea; and at that time there was a great variation amongst the Courts as to what was raised on the pleadings. It was a judgment *ex relatione*, after talk with other Judges; and I should have thought more of it if it had not been founded on what was learnt from the other Courts; for I think the real question in this case was not before the mind of the consulting Judge. The Court there says, if the name of one partner binds the firm, then, "though the defendants show that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction." I think myself that the effect of that judgment was only a point of pleading, and that it does not invalidate the widely applicable rule, that, if a bill be tainted with fraud or illegality in its inception, the holder must prove that he, or some one under whom he claims, gave value for it.

WILLIAMS, J.—Mr. Pollock could not have maintained a show of argument, but for the case of Musgrave v. Drake: and I quite agree with the Chief Justice, that that case turned on a question of pleading. It decided that evidence was inadmissible to show that the holder had not given value, unless it was specially pleaded. Here no question of pleading is raised. I apprehend, under these circumstances, the one partner had not *prima facie* authority to bind the firm by his acceptance.

WILLES, J.—I am of the same opinion. Musgrave v. Drake was on a point of pleading, and was a simple case of acceptance by a partner, who, *prima facie*, had authority to accept. I cannot help thinking that the Court, in their desire to narrow the issue, omitted to consider what would be the effect on the subsequent law in so narrowing it. I am satisfied the Court would not have come to that conclusion, if the partner, as here, never could have had authority to do what he did. But I do not proceed on any such distinction: for I cannot assent to the proposition there laid down, that, under a plea denying the acceptance, and on proof that the acceptance is by one partner who can bind the firm, and in fraud of the others, the plaintiff need not explain the transaction, if he has no notice of the fraud.

A partner is bound by an acceptance, though not actually his, because, having consented to the exist-

ence of an authority to accept, he is bound to be responsible to persons who *bona fide* take bills so accepted. That acceptance is binding on him, for no other reason than an *estoppel in pais*.

The question here resolves itself into one of burden of proof. My Brother Byles, in his Book on Bills, (8th ed. p. 111), lays down, with his usual clearness, that, for a holder to recover on a fraudulent bill, the original holder's title being 'destroyed, he must show that he gave value; and, "therefore, where the question is thus raised, whether the transferee be a holder for value, it is not for the defendant to prove the absence of value, but for the plaintiff, the transferee, to prove value given, either by himself, or by some one under whom he claims." I also refer to my Brother Byles' notice of *Musgrave v. Drake* (p. 44), where he treats it as depending entirely on a question of pleading. He treats it as an exception, on the ground of the narrow issue, which I am bound to say I think narrower than it should have been.

KIRKING, J., concurred.

Rule discharged.

C. P. } BORRIES and Others v.
19 JAN. 1865. } HUTCHINSON.

Measure of Damages on Non-delivery of Goods where no Market—Increased Freight paid by Vendee—Resale by Vendee, and subsequent Resale.

The measure of damages for non-delivery of goods, if there is a market, is the difference between the contract price and the market price when they should have been delivered; but if there is no market, and the plaintiff has acted with reasonable care and skill to diminish the loss, the measure of damages is the difference between the actual value of the goods when delivered and when they ought to have been delivered.

Defendant sold to the plaintiffs, and agreed to deliver to them within a certain time, seventy-five tons of caustic soda, he at the time knowing that it was wanted for the Continent, and would be shipped from Hull. The plaintiffs at the time of this agreement resold the soda to Heintmann at St. Petersburg, and he resold to Heimbürger. None of the soda was delivered till after the specified time, and then the plaintiffs had to pay a higher rate of freight and insurance to St. Petersburg on such part of the soda as was delivered, on account of the approach of winter. There was no market for this particular kind of soda:—

Held, that, besides their own loss on the contract with Heintmann, the plaintiffs were entitled to recover from the defendant the additional cost of freight and insurance on the soda delivered: but that the loss on the contract between Heintmann and Heimbürger was too remote.

Declaration "for that on the 14th day of May,

1863, the plaintiffs agreed to buy of the defendant seventy-five tons of his best caustic soda, strength guaranteed not to be less than seventy per cent. . . . at the price of 16l. 5s. per ton, free on rails at Widness' Dock, less two-and-a-half per cent discount, and one per cent. commission, on payment cash fourteen days after delivery. Shipments to be twenty-five tons in June; twenty-five tons in July, and twenty-five tons in August;" averring performance of conditions precedent, and laying as breach the non-delivery of the soda; "and the plaintiffs, by reason of the premises, have been prevented from performing a certain other contract made by them with Heintmann of St. Petersburg, for the sale to him of the said caustic soda at greatly increased prices, which last-mentioned contract was made on the faith of the agreement by the defendant; and by reason of the premises the plaintiffs have become and are liable to the said Heintmann for damages for the non-performance by them of their said contract; and by reason of the premises the plaintiffs have been obliged to pay a much larger sum for freight and insurance than they otherwise would have done if the defendant had performed his said contract," &c. Claim 300l.

Plea, payment into Court of 52l. 2s. 4d.

Issue on replication of damages ultra.

The plaintiffs were merchants at Newcastle, and the defendant was a manufacturer of caustic-soda at Liverpool. On the 11th of May, 1863, the defendant's manager was at Newcastle, and offered in writing on his behalf to sell the plaintiffs seventy-five tons of caustic-soda on the terms stated in the declaration. The plaintiffs on the receipt of this offer at once telegraphed to Heintmann at St. Petersburg offering the soda to him, "at least seventy per cent.," for 17l. 10s. a-ton; and wrote to him the same day that it was of the same make as sample No. 2, which they had previously sent him. Heintmann received the telegram on the 12th of May, and at once telegraphed back, "accept seventy-five tons, if according to sample 2:" and the same day wrote to the plaintiffs, that, in expectation that the soda was according to sample No. 2, he had sold it to Heimbürger.

On the 13th of May, the plaintiffs, having received Heintmann's telegram of the 12th, wrote to the defendant accepting his offer of the 11th, and informing him that they wanted the soda for "friends on the Continent," and that it would be shipped from Hull: and the next day the defendant acknowledged the receipt of this acceptance. On the 15th the plaintiffs wrote to Heintmann finally concluding the sale to him at 17l. 10s. a-ton, free on board at Hull.

On the 4th of June the plaintiffs agreed with shipping agents at Hull to carry the soda thence to St. Petersburg at 15s. per ton freight, and ten per cent. After August the rates for freight and insurance from Hull to St. Petersburg are materially increased by the approach of winter; and at the end of October the season for shipment to St. Petersburg closes

altogether. The defendant did not deliver any of the soda in June, July, or August, though the plaintiffs frequently wrote to him on the subject, and told him that Heintmann was complaining of the delay, and that freight and insurance would be higher. Between the middle of September and the end of October twenty-six tons were forwarded by the defendant to Hull, and shipped at the lowest freights then obtainable, viz., 35s. a-ton, and ten per cent., and one small shipment was at the rate of 50s. a-ton and ten per cent. In November the plaintiffs paid the defendant 228*l.* 9*s.* 2*d.*, the price of the soda delivered; and soon afterwards received from Heintmann a claim for 200*l.*, viz., 40*l.* 17*s.* for difference in freight and insurance, and the rest for his profits, and compensation claimed of him by Heimbürger. The plaintiffs then made a claim on the defendant for 252*l.* 2*s.* 4*d.*, viz., 52*l.* 2*s.* 4*d.* for their own losses, and 200*l.* for the claim on them by Heintmann: and brought this action. The defendant paid into Court 52*l.* 2*s.* 4*d.* to cover the plaintiff's own losses, but denied any further liability.

There was no market at St. Petersburg for caustic soda of the strength of that made by the defendant, nor could any other English maker have supplied seventy-five tons of such soda before the end of October.

At the trial, before Willes, J., at the Guildhall in last Michaelmas Term, the jury found a verdict for the plaintiffs for 199*l.* 17*s.* beyond the sum paid into Court.

A rule was then obtained pursuant to leave reserved to set this verdict aside and enter it for the defendant, or to reduce the damages as the Court should direct, on the ground that the damages claimed beyond the amount paid into Court were too remote.

Temple, Q.C., and *Udall*, showed cause.

The special circumstances under which the contract was made were known to all parties. The defendant knew that the soda would be shipped from Hull to the Continent, and he ought to have inferred that it would probably be shipped to a northern or Baltic port—at all events, to a port to which freight and insurance would be much increased towards winter. Consequently the extra cost of freight and insurance was in contemplation of both parties at the time of contracting as the probable result of a breach, within the rule in

Hadley v. Baxendale, 9 Exch. 341.

Besides, there was here no market. The plaintiff's contract with the defendant was transferred to Heintmann, and by him to Heimbürger, the only alteration being in price; and defendant knew that Heimbürger was making claims on Heintmann for non-delivery. Therefore the damage suffered by Heintmann is not too remote; and the defendant's liability does not cease till the goods have passed through the hands of

buyers, who are "friends on the Continent," to the manufacturer.

Randall v. Roper, 27 L. J. Q. B. 267.

If it was known to the parties that it was a contract for re-sale, the loss can be recovered from the first vendor. The canon of damages in such a case is laid down in

Passenger v. Thorburn, 85 Barbour's Sup. Court of New York, R. 17;

Griffin v. Colver, 2 Smith's New York Appeals, pp. 489, 494.

They also cited,

Barrow v. Arnaud, 8 Q. B. 595, 609;

Dunlop v. Higgins, 1 H. of L. Ca. 381, 403;

Mayne on Damages, 15, 18;

Josling v. Irvine, 30 L. J. Ex. 78;

Smeed v. Foord, 28 L. J. Q. B. 178.

Brett, Q.C., and *Littler*, in support of the rule.

Damages must not be too remote; and on breach of a contract to deliver, the plaintiffs cannot lie by and allow damages to mount up when they have a reasonable opportunity of making them less. Those two rules are distinct, and it is with reference to the latter that the doctrine of going into the market arises; but here there was no market. No name but that of the plaintiffs was disclosed at the time the contract was made; and the natural result of a breach of it would merely be, that the plaintiffs would have to order the goods of another manufacturer, or wait till we could supply them, and could not include loss on a sub-contract. The additional freight and insurance was the consequence of another contract,

Portman v. Middleton, 27 L. J. C. P. 231.

BALDWIN, C.J.—The general rule in actions for breach of contract by non-delivery of goods is, that the vendor pays damages measured by the price of the article in the market, when it ought to have been delivered, compared with the contract price. But when the goods are not marketable, and you cannot get a supply of them, another principle comes into operation, and special damage may be recovered; and that principle is in accordance with *Hadley v. Baxendale*, for it says that the vendor shall pay damages which he had notice that he might be liable to. Here there was a notice that the plaintiffs had a vendee on the Continent, and the defendant contracted with this knowledge that the plaintiffs would resell. If the goods had been delivered there would have been a profit to the plaintiffs of 52*l.* 10*s.*, and that sum the defendant has rightly paid into Court. The plaintiff wanted these goods in August, because of his purchaser in Russia, and because he could deliver them then at a less freight and insurance than he could do later. His loss in fact on that head was 40*l.* 17*s.*; that was what Heintmann had to pay, and the plaintiff to repay Heintmann. It was said that as there was a notice that the goods were wanted for a purchaser on the Continent, and of the port of shipment,

the defendant had reason to infer that the soda was wanted for the Baltic. But I cannot agree in that. The contract then, being broken, what are the damages arising that might reasonably be expected from that breach. At the time when the goods were sent to Hull they were not so available for the Baltic market as they would have been if sent earlier; and if the plaintiffs have done all that a man with reasonable care and skill can do to diminish the loss, they can cast that amount of damage or deterioration on the defendant. The plaintiffs did, I think, turn their opportunities to the best account, and reduced the deterioration to the lowest degree they could with reasonable care and skill. I think therefore that the plaintiffs are entitled to charge for a deterioration of the article to the extent of 40*l.* 17*s.*, the cost of extra freight and insurance.

Then there is a further claim for 200*l.* loss on a sub-sub-sale by Heintmann to Heimburger, and Heintmann claims that of the plaintiffs, and the plaintiffs claim it of the defendant. But I think the claim is too remote. There was no notice of it, nor is it in the ordinary course of business, that a purchaser from the plaintiffs, the first vendees, should re-sell, and so go on through any number of sales. Loss on such a re-sale cannot be a consequence of the breach of contract.

WILLES, J.—I am of the same opinion. As to the contract between Heintmann and Heimburger, it was consistent with the known facts, that such a contract might or might not have been entered upon, but it is clear, under the circumstances, that the defendant cannot be made liable for that. This is a different case from that referred to of the barley (*Randall v. Roper*), where the seed was warranted of a particular kind, and it depended on latent claims whether the loss fell on the first or sub-purchaser. But here there was no notice of the sub-sale at the time of the contract, and it would be very unjust that the defendant should be held liable for so remote a contingency. As to the extra insurance and freight, I think that can be recovered as a direct consequence of the breach of contract. No suggestion is made that the plaintiffs could have made the soda more valuable to them than it was, and they did the only reasonable thing they could do. Where there is a market, the measure of damages is the difference between the market price and the contract price at the time of the failure to deliver; and that is not a mere conclusion of lawyers, but is acted on by mercantile men. But even when there is a market, there may be notice that the goods are to be delivered in pursuance of a particular contract, and that would inflate the damages on non-delivery. But that is not the case here; and the value of the soda must be ascertained without reference to the market price, for there is none. We must ascertain the difference in its actual value when

it was delivered, and when it ought to have been delivered. When it was delivered, it was still capable of being transferred to Riga, but only at a greater freight; and therefore the difference between what would have to be paid at the earlier and later periods constitutes the difference in value. It is clearly a consequence of the non-delivery, and consequently, as to 40*l.* 17*s.*, the verdict ought to stand.

KEATING, J.—I think the plaintiffs should recover for the increased freight and insurance the goods became liable to, on the grounds already stated; and that is quite consistent with the principle acted on by this Court in *Wilson v. The Lancashire and Yorkshire Railway Company* (9 C. B. (N. S.) 632). That was a contract for carriage of cloth, which the plaintiff wanted to make up in caps, and to show the goods to the best advantage it was necessary that he should make them up at a certain season; and this Court thought that the deterioration of the cloth by non-delivery during the season might fairly be considered in estimating the damages. On the other point, I entirely agree with the rest of the Court that the damages are too remote.

*Rule absolute to reduce the damages to 40*l.* 17*s.**

C. P. { CLARKE, Assignee, &c. and Others
25 JAN. 1865. { v. WATSON and Another.

Contract for Works—Payment on Production of Certificate of Surveys—Wrongful withholding of Certificate.

A declaration on an agreement to pay money for certain works on production of a certificate of the defendants' surveyor that the works had been duly performed, and alleging that the surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, and that the defendants had not paid the money:—

Held bad on demurrer, there being no allegation of fraud or collusion on the part of the defendants.

Declaration by the plaintiff Clarke, as assignee of one Ayers, a bankrupt, and by the other plaintiffs, Mallews and Johnson, against the defendants.

1st Count. That before the said Ayers became bankrupt (to wit, on the 9th of October, 1862), by an agreement in writing then made and entered into between the said Ayers, Mallews, and Johnson, therein called the contractors of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned in conformity with certain plans, drawings, and sections, and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain Board of Health for the time, should such be found necessary, at or for 312*l.* 15*s.*, to be paid as follows—

156*l.* 7*s.* 9*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they the said contractors had duly and efficiently performed and completed such portion of the work as, according to the judgment of the said surveyor, should be not less than three-quarter parts thereof in extent and value; 75*l.* 8*s.* 9*d.* on the production by the said contractors to the defendants, or one of them, of the certificate of the said surveyor, as aforesaid, that the whole of the works mentioned and referred to in the said plans, drawings, and specifications had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the engineer for the time being of the local board of health, if necessary; and the balance of 78*l.* 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion, provided the therein mentioned roads, pathways, drains, and culverts, and every part thereof, should then be certified by the said surveyor to be in good repair, and in perfect and sound condition in all respects; it being thereby intended and agreed, that all the said works and materials should be so put and kept in good repair, until the expiration of such four months from completion, by and at the sole cost and expense of the said contractors; and the defendants thereby agreed with the said Ayers, Mallocks, and Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the said sum of 312*l.* 15*s.*, at the times and in the manner thereinbefore mentioned. And the plaintiffs aver that, although 156*l.* 15*s.*, part of the said sum of 312*l.* 15*s.*, has been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants, that the whole of the works in the said plans, drawings, and specifications, have been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the said Local Board of Health, have been done and performed by them. Yet the surveyor has not given such certificate, but has wrongfully and improperly neglected and refused so to do; nor have the defendants paid the said sum of 78*l.* 3*s.* 9*d.* payable on such certificate. And the plaintiffs further say, that, although more than four months have elapsed since the said surveyor ought to have given such certificate, and although all things have been done by the said contractors on their part to entitle them to a certificate of the said surveyor, that the roads, pathways, drains, culverts, and every part thereof, were, at the expiration of the said four months, in good repair, and in perfect and sound condition in all respects, yet the said surveyor has not granted such certificate, but has wrongfully and improperly neglected and refused to do so; and the defendants have not yet paid the said balance of 78*l.* 3*s.* 9*d.*

D Under in demurrer.

Plaintiffs' points:—

1st. The surveyor is the agent of the defendants: they are bound to employ him to testify according to the said agreement.

2nd. He is responsible to them for improperly certifying, or omitting to certify.

3rd. And they are responsible to the plaintiffs.

4th. The wrongful refusal of the defendants' agent to certify, is a dispensation of the condition precedent, and equivalent to the defendants' preventing the certificate being granted.

Defendants' points:—

That the declaration shows no cause of action against the defendants.

That the plaintiffs are not entitled to recover without obtaining the several certificates of the surveyor.

That the defendants are not liable for the surveyor not giving such certificates. And that, in the absence of such certificates, no breach of agreement is shown.

Henry James, for the defendants, in support of the demurrer, was stopped.

Serjt. Parry (*Joyce* with him), for the plaintiffs, in support of the declaration, cited,

McIntosh v. Great Western Railway Company,
14 Jur. 819;

Pawley v. Turnbull, 7 Jur. (N. S.) 792;

Scott v. Corporation of Liverpool, 1 Off. 216;

Battersbury v. Vyse, 2 N. R. 79; 2 H. & C. 42;

Milner v. Field, 5 Exch. 829.

ERLE, C.J.—Our judgment must be for the defendants. The contract by the defendants was to pay on the production of a certificate by the surveyor. Very many contracts are made in this way. Every man is master of what contract he chooses to make. Having made it, it is very important that he should be forced to abide by it. The contract here was to pay on the production of a certificate, and no such certificate is alleged to have been produced. But the argument for the defendants has been, that the surveyor wrongfully withheld the certificate, and that the defendants are liable for that. If the surveyor had colluded with the defendants, they would have been liable, and could not have sheltered themselves under the non-production of the certificate. But no fraud or collusion is imputed to them here. This is an attempt of the plaintiffs to take away from the defendants the protection of the surveyor's certificate, and to substitute for it the opinion of a jury. This would be highly inconvenient. I think the allegations in the declaration do not entitle the plaintiffs to succeed.

WILLIAMS, J.—I am of the same opinion. This is an attempt of the plaintiffs to recover a sum of money which is not due by the terms of the contract.

WILLES and KEATING, JJ., concurred.

Judgment for the defendants.

Ex. } CAMPBELL v. LOADER.
12 JAN. 1865.

Trespass for Mesne Profits—Judgment in Ejectment in County Court under 19 & 20 Vict. c. 108, s. 50.

The plaintiff brought an action of ejectment in the County Court against the defendant to recover possession of certain premises, of which the defendant was sub-tenant, holding them from the plaintiff's lessee. An order for delivery of possession was made by the County Court, with the terms of which the defendant complied. The plaintiff having subsequently brought an action of trespass for mesne profits against the defendant, to recover rent from the date at which the plaintiff's lessee had ceased to pay rent to the plaintiff:—

Held, that the County Court order was not conclusive as to the plaintiff's right to treat the defendant as a trespasser and to recover mesne profits.

The Court will not entertain questions as to the admissibility of evidence, unless the evidence has been formally tendered at the trial.

This was an action of trespass for mesne profits. The declaration was in the common form. Plea—Not Guilty; and at the trial, which took place in Michaelmas Term before Martin, B., the facts, as material to the case, were shown to be these:—

The plaintiff, one Campbell, was in possession of certain premises, situate at No. 5, Argyll Place, Regent Street, and let a coach-house and stables, part of the above premises, to one John Ellis, from the 1st of September, 1858, by the week at a certain rental. Ellis died about 1860, and his widow, Harriett Ellis, retaining the occupation of the premises, sublet the greater part of them to the defendant at an improved rental. The plaintiff, at different times, served Harriett Ellis with a week's notice to quit (to which she paid no attention, alleging that her tenancy was quarterly, and that she was entitled to six months' notice), but waived such notices by the subsequent receipt of rent. It was at length arranged that she should give up possession on the 25th of March, 1864, and an agreement to that effect was signed by her on the 17th of that month.

No rent was paid to the plaintiff after the 25th of December, 1863. On the 25th of March, 1864, the defendant refused to give up possession, and a summons in the County Court was issued against him and one Jeffreys, to whom Harriett Ellis had sublet the remainder of the premises. On the hearing of this summons on the 19th of April, it was dismissed, on the ground that the defendants were no parties to Harriett Ellis's agreement, and that there had been no legal notice to quit.

On the 26th of April plaintiff caused a formal notice to quit to be served on Harriett Ellis, and also on the defendant and Jeffreys; but on the expiration of this

notice, on the 4th of May, they still retained possession of the premises.

A second summons was issued in the County Court, on the 25th of May; and at the hearing, on the 20th of June, an order was made for the delivery of possession on the 27th of that month. With the terms of this order the defendant strictly complied.

The plaintiff subsequently made a claim on the defendant for rent due after the 25th of December, 1863; and on payment being refused by him, the present action was brought.

Some discussion took place as to whether the agreement between the plaintiff and John Ellis was properly stamped; but this document was not formally tendered in evidence.

On these facts, Martin, B., ruled that the judgment of the County Court was not conclusive as to the right of the plaintiff to mesne profits, and also that the defendant could dispute the plaintiff's title, under the plea of Not Guilty. The question of the tenancy he left to the jury, who found for the defendant.

Morgan Lloyd subsequently obtained a rule nisi for a new trial, on the ground of misdirection and improper rejection of evidence. The latter point, however, became immaterial, as will be seen from the judgment of the Court.

Pearce now showed cause.

The proceedings in the County Court were under the 19 & 20 Vict. c. 108, s. 50. By the 51st section, which must be read in conjunction with the 50th, no claim for rent or for mesne profits can be made except against the tenant, though by the 50th section the plaintiff may be against the tenant or any person holding or claiming by, through, or under him. The effect of this is, that you may add a claim for mesne profits only when proceeding against the tenant; and in the present case there was no privity between the plaintiff and the defendant, entitling the former to recover mesne profits at all.

As the question was one of mesne profits, it was essential that the jury should have evidence of the nature of the tenancy, in order to enable them to assess the amount, if any, payable by the sub-tenant as mesne profits.

Morgan Lloyd in support of the rule.

The plea of "Not Guilty" means only that the defendant did not enter; and it is not open to him under that plea to dispute the plaintiff's title. The question of entry should have been alone submitted to the jury.

But assuming that the proper plea was on the record, the judgment of the County Court is conclusive between the parties, and the defendant is thereby estopped. It is analogous to the judgment in an ordinary action in ejectment.

[*MARTIN, B.*—A judgment in ejectment never was conclusive; and by the express words of the Common

Law Procedure Act, section 207, the new form of the action for ejectment is to have only the same force as the old.]

[CHANNELL, B.—The judgment of the County Court operates merely as an order.]

In the course of his argument he referred to the cases of

Vooght v. Winch, 2 B. & A. 662;

Aslin v. Parkin, 2 Burr. 665;

Doe v. Wright, 10 A. & E. 763.

CHANNELL, B.—I am of opinion that this rule must be discharged. As to the rejection of the agreement in evidence, I shall only say, that I do not see on the Judge's notes that any complaint was made at the trial, entitling the plaintiff to move for a new trial on that ground. It was the duty of counsel, after the expression of the Judge's opinion, formally to tender the document in evidence. On the main question, I have had rather more doubt. It has been said, that the judgment in the County Court was conclusive; and in that question has been involved one of pleading, namely, that the plea on this record only put in issue the fact of the trespass, and admitted the title of the plaintiff. I think that this is not the case, and that the broader issue was rightly raised. As to the further question, I cannot admit that the plaintiff may look at the County Court order as he would at the judgment in an action in ejectment. That order was strictly obeyed by the defendant, who gave up possession in conformity with the terms of it: and it would be absurd to hold, that an order which a man has thus obeyed places him in the position of a trespasser. Our attention has been called to the difference between the 50th and 51st sections of the 19 & 20 Vict. c. 108. By the latter section, when a plaintiff is proceeding against his own tenant, he may add a demand for rent or mesne profits. But except against his own tenant, he has no right to insert such a claim. And when this distinction exists, it would be going far to hold, that a judgment against a sub-tenant, which deprives him of possession, and makes him liable to pay costs, is evidence against him in a subsequent action for mesne profits.

FIGOTT, B.—I am of the same opinion.

MARTIN, B.—I am also of opinion that this rule

should be discharged. The action seems to me to have been altogether misconceived. I must say, that there is something revolting in supposing, that when a man has been in possession, and abandons it in strict accordance with an order of the County Court, he may afterwards be treated as a trespasser because of that very order. And it is obvious that, in this case, if the plaintiff could have recovered damages at all, such damages must have been merely nominal.

Rule discharged.

Ex. } CLARK v. WILLIAMS.
16 JAN. 1865.

Bankruptcy Act, 1861, s. 200—Deed of Assignment.

A deed in the form given in Schedule D appended to the Bankruptcy Act, 1861 (though duly executed and registered), cannot be pleaded in bar to an action.

Declaration—Common counts for goods sold and delivered, and for money lent.

Plea—Deed of assignment in the form given in Schedule D to the Bankruptcy Act, 1861, duly executed and registered.

Demurrer and joinder in demurrer.

Hence, in support of the demurrer.

The plea is bad, because the deed contains no release. The case of

Eyre v. Archer, 4 N. R. 334; 16 C. B. (N. S.), 638, decides the present.

Crompton, contra.

The plea is a good plea of accord and satisfaction at Common Law; and it has been held, that where there is any other Common Law defence, a release is not necessary.

[CHANNELL, B., referred to

Dingwall v. Edwards, 3 N. R. 642; 4 B. & S. 738.]

POLLOCK, C.B.—I am of opinion that this plea is bad. This case is decided by *Eyre v. Archer* (*supra*), and by the *Ipstones Park Company v. Pattinson* (3 N. R. 514): and we cannot re-consider those decisions.

The rest of the Court concurring,

Judgment for the plaintiff.

EQUITY.

Lord Chancellor. } *Re* RICHES.
 9 Nov. 1864. } *Ex parte* THE DARLINGTON
 18 JAN. 1865. } BANKING COMPANY.

Partnership—Bills of Exchange—Indorsement
—Authority of Individual Partner.

If the business of a partnership be such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes, or on the separate account, of the partner. In that case authority, by virtue of the partnership contract, ceases, and the person dealing with the individual partner is bound to inquire and ascertain the nature and extent of his authority; otherwise he must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud.

Where, therefore, one of three co-partners fraudulently indorsed a bill with the name of the firm, and the bill was, with the exception of the acceptor's signature, wholly in the handwriting of such partner, and was discounted by him with his own private bankers, who knew that the firm kept an independent account at another bank, and the proceeds were applied to the private purposes of the partner:—

Held, that the indorsement was not binding on the other members of the firm.

Previous to the year 1864, Messrs. Riches, Kay, & Marshall carried on business in Newcastle in partnership as ship-brokers. The financial affairs of the firm were wholly entrusted to Kay, in whom the other partners placed implicit reliance.

Kay died on the 1st of January, 1864, and shortly after his decease it was discovered that he had been fraudulently creating bills of exchange in the following manner—

The firm were in the habit of making advances to the captains of colliers. Kay used to write in pencil on a slip of paper a receipt for the amount advanced, and procure it to be signed in ink. At the upper end of the slip there was a bill stamp folded down underneath the paper, so as to be concealed from view. Kay afterwards filled up the slip, so that it appeared to be a bill of exchange, rubbed out the pencil marks, and wrote the words, "Accepted at Messrs. Barclay & Co., Bankers, London," in their place.

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The slip, therefore, after being thus treated, was in the following form—

"Sunderland,
 "16 Sept., 1863.

"£88. 17s. 3d.

"Four months after date pay to our order in London eighty-eight pounds seventeen shillings and threepence, value received in charges and coals shipped on board the brig 'Thompson,' as advised.

"RICHES, KAY & MARSHALL.

"To Capt. Charles Richardson,
 "Southampton."

And written across the slip—

"Accepted, payable at

"Messrs. Barclay & Co.,

"Bankers, London.

"CHARLES RICHARDSON."

These acceptances, indorsed in the name of the firm, and also by Kay, were discounted by the latter with the Darlington District Banking Company, at one of whose banks he had a private account, and who were not the bankers of the firm. For several years bills to the amount of between 6000*l.* and 7000*l.* a-year were thus discounted. The indorsements were entirely in the handwriting of Kay, and the Darlington bank knew that the firm kept an independent banking account.

After Kay's death, Riches & Marshall executed a trust deed, which was perfected under the Bankruptcy Act, 1861. The bank claimed to be admitted to the benefit of such deed as creditors of the firm for a sum of 1,400*l.*, in respect of bills of exchange thus endorsed, and, on the trustee refusing to recognise these bills, applied to the Court of Bankruptcy for the Newcastle district.

The Commissioner dismissed the application, and the bank now appealed against this decision.

Bacon, Q. C., and De Gez, for the appellant.

The mere fact, that these bills were indorsed by Kay himself with the name of the firm, and the proceeds carried to his private account, was not sufficient to warn the bank that the name of the firm was improperly used. Such transactions are not uncommon, and commercial affairs will be greatly clogged if a firm is allowed to repudiate bills thus accredited.

They cited, and commented on,

Ex parte Bonbonus, 8 Ves. 540;

Ex parte Agace, 2 Cox, 312;

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Shirreff v. Wilks, 1 East, 48 ;
Ex parte Goulding, 2 G. & J. 118 ;
Ex parte Peel, 6 Ves. 603 ;
Ridley v. Taylor, 13 East, 175 ;
Ex parte Bushell, 3 M. D. & D. 615.

Greene, Q. C., and *Roxburgh*, on the other side, were not called upon.

18 JAN. 1865.

THE LORD CHANCELLOR said, this was an application to have a proof admitted for a sum of 1,400*l.* due on certain bills of exchange, expressed to be drawn, and also indorsed, in the name of a firm of which the debtors were the surviving partners.

These bills had been discounted by the deceased partner with his own private bankers.

They appeared, on the face of them, to be securities belonging to the partnership ; they appeared to be the property of the partnership, and any person looking at the indorsement, would immediately have presumed that Kay had indorsed over the partnership security to himself ; and, if he were the private creditor of Kay, he would also know that Kay was using this partnership security, which he had thus appropriated, for his own private purposes.

Now, the law on the subject was perfectly clear, and well established. Generally speaking, a partner had full authority to deal with the partnership property for partnership purposes. If the business of the partnership were such as ordinarily required bills of exchange, then, unless restrained by agreement, any one partner might draw, accept, and indorse bills of exchange in the name of the partnership, for partnership purposes. All persons might give credit to his acts, and his authority, unless they had notice, or reason to believe, that the thing done in the partnership name, was done for the private purposes, or on the separate account, of the partner. In that case, authority, by virtue of the partnership contract, ceased, and the person dealing with the individual partner, was bound to inquire and ascertain the extent of his authority ; otherwise he must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud.

These principles had been established by a long series of decisions, if indeed decisions were at all required to show the proper application of a rule of law, so plain and obvious, and which resulted from the ordinary law of agency as applied to partnership. It would be sufficient to refer to *Ex parte Peel* (*loc. cit.*), *Ex parte Bonbonus* (*loc. cit.*), and the other cases cited in the course of the argument. The rule was also well expressed in a passage to be found in a book of considerable merit, viz., Mr. Smith's "Mercantile Law" (p. 46, 6th ed.), and which was cited by the Judges of the Court of Common Pleas in a recent case of *Leverson v. Lane* (13 C. B. (N. S.) 278), with great approbation. The words were these, "It would seem that the unexplained fact that a

partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud ; or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing, either that the partner, from whom he received it acted under the authority of the rest of his partners, or that he himself had reason to believe so."

It was immaterial whether the partnership security was applied in discharge of an existing debt, or whether it was used by the individual partner for the purpose of obtaining money from his own bankers, to be applied for his own personal purposes.

There had been some attempts made here, on the part of the bank, to allege that the moneys advanced by them to Kay were used by him for partnership purposes. Even if that could be shown, the result would be merely this, that the proof would stand as a proof by the persons now applying, in respect of that debt (if any) which was due from the partnership to Kay in respect of the money so applied. That would avail the present applicants little, even if the case could be substantiated ; for there was no doubt that Kay had greatly defrauded his co-partners.

Some attempts had been made to show, that the partners ought to have been cognisant of a transaction of this description ; but there was nothing to justify any such inference or conclusion. It was quite clear that this gross forgery and fraud of Kay was a scheme, resorted to by him simply for his own purposes, and which he carried on with the view to his own private advantage, through the agency of these separate bankers.

The bankers themselves had been undoubtedly guilty of great negligence. They must have seen, on the face of the bills, that the bills had been called into being by the individual partner who wrote the name originally at the foot of the bills ; that the same hand wrote also the indorsement ; and that the same hand added the individual name of Kay.

On the face of the thing, it was therefore plain, that the partnership security had been converted by the individual partner into his own private personal property, in order to its being converted to his own private purposes ; and yet the bank received such bills, and discounted them, at the instance of the individual partner with whom they had an account, knowing full well that the firm itself had a proper bank of its own, with which the ordinary account was kept. Their case could not be put higher than the right of the individual partner with whom they dealt, and they could have no claim to be compensated by the partnership, unless that were the right of their individual customer.

The motion of appeal would be dismissed, and the appellant must pay the costs.

Lord Chancellor. } **FRANCOME v. FRANCOME.**
27 JAN. 1865.

Practice—Evidence—Affidavit—Authorised and Unauthorised Reports.

An affidavit sworn on the day before the filing of the bill, is not admissible in evidence.

Fennall v. Brown (18 Jur. 1051), not followed.

The Court will allow the unauthorised reports to be cited.

In this case, which was of pressing importance, the affidavit in support of the bill was sworn in the country, on the day before the bill was filed.

W. W. Karlake having moved for an injunction before Stuart, V.-C., on the authority of *Fennall v. Brown* (18 Jur. 1051), the Vice-Chancellor declined to accept that case as an authority, on the ground that it was not reported in the authorised reports; and he refused the application. The application was now renewed before the Lord Chancellor.

THE LORD CHANCELLOR said, that it would be contrary to the practice of the Court to make an order for an injunction on an affidavit sworn on the day before the filing of the bill, for the affidavit could not be inserted in the order; an affidavit sworn on the same day might be inserted, although it was sworn before the bill was actually filed.

He understood that an indictment for perjury could not be maintained on such an affidavit as that, which it was proposed to make the foundation of the order.

He did not decline to follow the case cited because it was reported in the unauthorised reports; he should deprive himself of most valuable assistance, if he refused to allow those reports to be cited. He could not, however, accept the case in question as an authority for the reason which he had mentioned. It was different where an affidavit which had been sworn, but not filed, had been allowed to be used on the undertaking of the party to file it.

Lords Justices. } **WILSON v. WEST HARTLE-**
8, 9 NOV. 1864, } **POOL RAILWAY AND HAR-**
19 JAN. 1865. } **BOUR COMPANY.**

Specific Performance—Contract with Company not under Seal—Authority of General Manager—Terms of Contract.

The plaintiff entered into a contract by letter with C, the general manager of a railway and harbour company, for the purchase of some land belonging to the company. In pursuance of the terms of the contract a branch line of rails was laid down by the company, and possession was given to the plaintiff, who placed some machinery upon the land in such a manner that the knowledge of what was done must have come to

the directors. Nine months after the date of the contract the company informed the plaintiff that C had no authority to contract, and they repudiated the contract:—

Held, that, though C had no authority to enter into the contract, yet what subsequently passed amounted to a ratification of it; and the objection that,—the contract was not under seal according to the statutory enactment as to contracts by companies, was overruled.

One of the terms of the contract was, that the plaintiff should use the defendants' railway whenever reasonably practicable, and as far as was reasonable:—

Held (dissentiente KNIGHT BRUCE, L.J.), that such an agreement would be sufficiently performed by the plaintiff entering into covenants with the company to fulfil the agreement; and that such conditions were, therefore, no objection to the contract being decreed to be specifically performed.

This was an appeal from a decree of the Master of the Rolls ordering the specific performance of an agreement for the sale of a piece of land belonging to a railway and harbour company.

The plaintiff being desirous of establishing iron-works in the neighbourhood of West Hartlepool, agreed in August, 1859, to purchase from the defendants, the West Hartlepool Railway and Harbour Company, a piece of land on the west side of the railway. The precise nature and terms of the agreement did not appear, but the plaintiff was put into possession; and machinery and plant to a large amount were placed by him on the piece of ground. Soon afterwards negotiations took place between the plaintiff and Mr. Chester, the general manager of the company, for giving up the piece of land so purchased by the plaintiff, and taking another piece on the opposite side of the railway instead.

On the 7th of November, 1859, Mr. Chester wrote to the plaintiff a letter, which was in part as follows:

“West Hartlepool Harbour and Railway,
“General Manager's Office,
“Nov. 7th, 1859.

“DEAR SIR,—On condition that you return to this company the piece of land on the west side of the railway, bought of them in August last, I now beg to offer to sell you the three pieces of land [described in the letter] at the rate of 220*l.* per acre, subject to the conditions and stipulations on which you bought the before-mentioned piece of land in August last, viz.” (*inter alia*):

“1st. The land shall be used for the erection of works, and dwelling-houses shall not be erected on it, with the exception of such as you may require for the use of yourself and your own men.

“2nd. Traffic to and from the works shall be conveyed on the terms stated in the agreement made on the 8th of August, 1859, and the other stipulations of that agreement fully carried out.”

“6th. The West Hartlepool Harbour and Railway

Company will lay down two lines the entire length between the main line and the land now offered for standage and for your exclusive use, and no other line or other work or erection shall be placed on any portion of the land which lies between the present line of railway and the land now offered. The company will also put in such points and crossings as may be required, and carry connecting lines from them to the railway fence.

"The West Hartlepool Harbour and Railway Company will also agree not to put any erection on that part of the sea banks which lies between the dwelling house you intend to erect and the sea, nor to do anything to intercept the view from, or create a nuisance to, the house. Should the company at any time wish to let or sell the banks which lie between the land now offered and the sea, or any part of them, you shall have the first offer of them."

The letter was signed,

"P. pro the West Hartlepool Harbour and Railway Company,

"SAMUEL CHESTER."

The letter enclosed a paper or schedule signed by Mr. Chester in the same manner, which set forth the terms of the agreement of the 8th of August, 1859. These were terms on which the West Hartlepool Harbour and Railway Company bound themselves to carry goods for J. R. Wilson & Co., and the following clause :

"J. R. Wilson & Co. agree to use the West Hartlepool Harbour and Railway Company in preference to all others, to use it whenever reasonably practicable, and for the longest distance it is reasonably capable of use."

On the 15th of November, 1859, the plaintiff wrote a letter to Mr. Chester, containing an unqualified acceptance of the offer contained in the above letter.

On the 16th of November, Mr. Chester wrote to the plaintiff, acknowledging the receipt of the last letter, and promising to give the company's solicitor instructions respecting the conveyance of the land, and stating that Aird was going on with the measurements and plan of the ground. Aird was the surveyor and estate agent of the company. Before the end of November, the company laid down the branch railway, and began to bore for water according to the terms of the contract, and the plaintiff removed his machinery and plant from the spot on the west side of the railway to the spot on the east side. A few days after the rails were laid down, they were observed by Mr. Watson, one of the managing directors, who made inquiries, and expressed his disapproval to Mr. Chester, and denied Mr. Chester's authority to enter into the contract. Mr. Jackson, the other managing director, also expressed his disapproval, and once, in the presence of the plaintiff's solicitor, said that the directors repudiated the contract; but no direct communication to that effect was made to the plaintiff. The company

being very anxious to retain the land on the east side of the railway, various attempts were made to find another piece of land for the plaintiff's works, but the negotiations failed, and the plaintiff insisted on the performance of the contract. Mr. Chester died in March, 1860. The first repudiation in writing of the contract was in a letter to the plaintiff of the 29th of August, 1860, and the plaintiff denied any previous verbal notice. The letters constituting the contract were not copied in the general letter-book of the company, but in a letter-book which was always kept in Mr. Chester's office. It appeared that in several instances Mr. Chester had entered into agreements for the sale of land belonging to the company, which had been subsequently carried into effect, and that the blank forms of leases had been given him to fill up, signed by the directors. There was some conflict of evidence as to whether the company had in November, 1859, absolutely resolved to part with no land on the east side of the railway. The company alleged that a partnership was intended between the plaintiff and Mr. Chester, but this was not proved, and was expressly denied by the plaintiff.

The Attorney-General, Selwyn, Q.C., and Fry, for the plaintiff.

By the general course of proceeding adopted by the directors and Chester, the latter was authorised to enter into this contract so as to make it binding upon the company. It was not necessary that every contract should be under the seal of the company. The clause of the statute as to contracts of companies (8 & 9 Vict. c. 16, s. 97) was permissive only. It could not be intended that no contract, however binding upon the other party, should bind a company unless under seal.

But whatever was the binding character of the contract, the acts done in accordance with it, and in part performance, were such as, on the ordinary rules, were amply sufficient to entitle the plaintiff to have it specifically performed.

They cited,

London and Birmingham Railway Company v.

Winter, Cr. & Ph. 57;

Laird v. Birkenhead Railway Company, John. 500;

Earl of Lindsey v. Great Northern Railway Company, 10 Hare, 664, 700;

Williams v. St. George's Harbour Company, 2 D. G. & J. 547;

Pauling v. London and North Western Railway Company, 8 Exch. 867.

Sir Hugh Cairns, Q.C., Hobhouse, Q.C., and Hawkins, for the defendants,

1st. This agreement is incomplete, inasmuch as the letter relied on by the plaintiff referred to a previous contract, the terms of which were not properly proved,

Ridgway v. Wharton, 3 De G. M. & G. 677;
6 H. of L. Ca. 238.

2nd. The agreement was not of a nature that performance of it could be specifically decreed; as the Court could not compel the plaintiff to use the railway in the way agreed upon,

Gervais v. Edwards, 2 Dr. & War. 80;

Ogden v. Fossick, 1 N. R. 143;

Hills v. Croll, 2 Ph. 60;

Stockcr v. Wedderburn, 3 K. & J. 393;

Peto v. Brighton Railway Company, 2 N. R. 415;
s. c. 1 H. & M. 468.

3rd. Chester had no authority to enter into any contract for the sale of lands. And the so-called acts of part performance were not sufficiently proved to be authorised by the directors or even known to them; whereas they had expressed their disapproval of the contract when it became known to them, and, moreover, part performance could not bind a company.

4th. The contract not being under seal, could not be binding, even if otherwise unobjectionable,

8 & 9 Vict. c. 16, s. 97.

They cited, in addition to the cases cited on the other side,

Midland Great Western Railway of Ireland Company v. Johnson, 6 H. of L. Ca. 798;

Morphet v. Jones, 1 Swans. 172;

Seayood v. Meale, Pre. C. 560;

Buckmaster v. Harrop, 7 Ves. 341.

The Attorney-General, in reply, argued that the agreement would be specifically performed, when the plaintiff should have entered into a covenant to do the things agreed upon, and this could be enforced by the Court. He referred to the analogous case of an agreement to enter into a partnership, which was carried out by the parties entering into the necessary covenants in their partnership deed.

As to the incompleteness of the agreement, he cited,

Mundy v. Jolliffe, 5 Myl. & Cr. 167;

East India Company v. Nuthumbadoo Veerasawney Moodelly, 7 Moo. P. C. R. 482;

Parker v. Taswell, 27 L. J. (N. S.) 812.

KNIGHT BRUCE, L.J., said, that in the argument many points had been raised, which, in his opinion, it was not necessary to decide, because in the agreement, the specific performance of which was sought to be enforced, there were provisions which rendered that agreement incapable of being specifically performed by this Court. His Lordship was of opinion, that the agreement on the part of Mr. Wilson to use the railway whenever it was "reasonably practicable, and for the longest distance it is reasonably capable of use," rendered the decree for specific performance impossible, because that agreement on the part of Mr. Wilson could not be specifically enforced, and it would not be satisfied by merely compelling him to enter into

covenants with the railway company to perform it. His Lordship had carefully considered all the other parts of the agreement in forming his opinion, and he thought that the bill should be dismissed, without costs.

TURNER, L.J., said, that the case presented several points both of law and fact. It was first said that Chester had no general authority, being merely a manager of the company, nor any specific authority to enter into a contract for the sale of lands. Assuming, what was indeed in dispute, that he was a general manager, and not merely traffic manager, he thought that his authority must be considered as confined to the ordinary business of the company as carriers, and, therefore, not to such exceptional business as dealing with the lands of the company. The evidence had, in his Lordship's opinion, failed to establish any special authority in this particular case. But although the contract, when entered into by Chester, could not bind the company, yet it was said that the directors of the company had ratified it by their subsequent conduct. This, in his Lordship's opinion, was the case. Acts were done subsequently to the contract in conformity with it,—e.g., machinery was deposited upon the land, and the plaintiff was let into possession, and a siding was made to the railway. These acts, some of which must have been known to the directors, amounted to a representation that the contract was a valid and subsisting one. The plaintiff had been so far treated as a purchaser that he could not be considered a trespasser. But the case did not rest here, there was also, he thought, part performance. He could not accede to the argument which had been urged, that part performance could not bind a company. As respects the plaintiff, he thought that the agreement would be sufficiently carried out, by the plaintiff entering into covenants to do the acts agreed to by him.

It was lastly argued, that this contract, not having been entered into in accordance with the statutory provisions as to contracts of companies, was therefore invalid. Now it was not disputed, that the directors had power to dispose of lands. Having this power, they could, of course, ratify a contract, and this they had done. The question, then, was reduced to this, Did the Act, 8 & 9 Vict. c. 16, s. 97, permit this contract to be valid?

Now the Act of Victoria was affirmative, and did not takeaway any rights: it said how directors might make contracts; but it did not say, that no contracts otherwise made could be valid. Various authorities had been cited, but each depended upon its own circumstances. Upon the whole case, he could not see his way to altering the decree; but, as his learned brother differed from him, the decree must be without costs.

Minute.—Appeal dismissed without costs.

Lords Justices. } GRAHAM v. WICKHAM.
27 JAN. 1865.

Practice—Administration Suit—Decree—Costs, Charges, and Expenses Properly Incurred—Costs of other Suits—Taxing-Master—Discretion.

An order in an administration suit to tax the costs, charges, and expenses properly incurred by the executors, not being costs in the cause, may include costs incurred by them in defending their testator's estate in a suit in another Court, although such costs have not been provided for by the decree in the other suit, or in the order in the administration suit.

Payne v. Little, 27 Beav. 83, not followed.

Semble (per TURNER, L.J.), that it is not the ordinary practice that such costs should be provided for by the decree in the other suit.

Semble, also (per TURNER, L.J.), that such costs, when incurred before the institution of the administration suit, may be properly included under the head of just allowances.

The executors of a will were also residuary legatees: an administration suit was instituted, and, after the decree, a creditor's suit was filed by a partner of the testator, to have the partnership declared void, and a receiver appointed: some delay in appointing the receiver occurred, and the executors filed a bill for an account of the partnership assets, and also for a receiver, and a receiver was then appointed by consent. The executors also defended the creditor's suit, although the question had been decided at Law on the merits; but, in taking the accounts, they succeeded in reducing the creditor's claim by a considerable amount:—

Held, that, after the verdict at Law, the executors were not justified in defending the creditor's suit on the merits, without applying to the Court for leave to do so; but were entitled to their costs subsequent to the decree:

Held, also, that they ought to have applied to the plaintiff in the creditor's suit to move to appoint a receiver, and not having done so, were not entitled to their costs of the third suit.

Semble (per TURNER, L.J.), that the Taxing-Master had discretion to take into consideration the fact that the executors were also residuary legatees.

This was a petition in the suit of *Graham v. Wickham*.

James Wickham, the testator in the cause, formerly carried on business, as a banker, with Charles Bailey; and, in the year 1850, Robert Rawlins joined the partnership.

Four years afterwards, it was discovered that great frauds had been perpetrated on the bank; and Rawlins, in 1855, commenced an action against the testator and Bailey, for misrepresenting the accounts when he joined the partnership.

The testator defended the action, which was then

discontinued; but, after the testator's death, it was carried on against Bailey alone, and a verdict found against him for a large sum, which was settled by arbitration.

The testator died in October, 1855, having appointed the defendants, James Wickham, John Wickham, and Charles Wickham, residuary legatees and executors of his will.

The testator's estate was insolvent, on account of the large debts of the bank, for which he was jointly liable.

The plaintiff, Graham, a separate creditor of the testator, instituted the suit of *Graham v. Wickham*, before the Master of the Rolls, in April, 1856; and on the 17th of January, 1857, the usual creditor's decree was made.

In February, 1857, Rawlins instituted a suit of *Rawlins v. Wickham*, before Stuart, V.-C., praying for a declaration that the partnership entered into with him with the testator and Bailey might be declared void, and that a receiver might be appointed of the partnership estate, and of the testator's real estate.

Rawlins carried in a claim, in *Graham v. Wickham*, against the separate estate of the testator for an unspecified amount, and this claim was adjourned by the Chief Clerk, to await the result of *Rawlins v. Wickham*: various other joint creditors of the bank proved against the separate estate of the testator, for a large amount.

In April, 1857, no receiver having been appointed in *Rawlins v. Wickham*, the executors of the testator instituted the suit of *Wickham v. Bailey*, to get in the partnership assets, and for the appointment of a receiver; and in June, 1857, a receiver was appointed by consent in the two suits of *Wickham v. Bailey*, and *Rawlins v. Wickham*, which were then amalgamated.

The two suits came on for hearing in the following year, and the Lords Justices, by their decree dated the 16th of December, 1858 (substantially affirming the Vice-Chancellor's decree of the 4th of May), declared that the partnership was void, and gave Rawlins liberty to prove in *Graham v. Wickham* for what should be found due to him in respect of the partnership, continued the receiver, and directed that the appeal deposit should be paid to Rawlins, but made no further order as to costs.

The case is reported on appeal in 3 De G. & J. 364.

In taking the accounts in *Rawlins v. Wickham*, 2000*l.* was disallowed out of Rawlins' claim.

By the order on further consideration made by the Master of the Rolls in *Graham v. Wickham*, dated the 5th of December, 1862, it was referred to the Taxing-Master to tax the plaintiff's and defendants' costs of the suit, the costs of the executors as between solicitor and client, and also to include any costs, charges, and expenses properly incurred by them as executors and trustees of the testator, not being costs in the cause; and it was ordered that the separate creditors of the testator should be paid their debts out

of his separate estate, and the balance, after payment of the costs, was to be apportioned among the joint creditors, including the amount found due to Rawlins in *Rawlins v. Wickham*.

The Taxing-Master disallowed the costs of the executors in *Rawlins v. Wickham*, and *Wickham v. Bailey*, on the ground that they were not such costs as were intended by the Court under the direction to tax the costs, charges, and expenses of the executors properly incurred, that they were not costs incurred by them as executors and trustees in discharge of their fiduciary duty, which ought to be paid out of the trust estate, but that they were the costs of personal litigation for their own personal interests, as residuary legatees, and that the costs of this litigation had been already adjudicated upon by the Court before whom the causes were heard.

On the 25th of July, 1864, the executors moved that it might be referred back to the Taxing-Master, to review his taxation, but the Master of the Rolls refused the motion, with costs.

By an order made on the 4th of August following, 600*l.* was directed to be carried to a separate account, to be called the costs account; such order to be without prejudice to the rights of any of the parties.

On the 5th of December, 1864, the Master of the Rolls dismissed, with costs, a petition of the executors for payment of their costs in *Rawlins v. Wickham*, and *Wickham v. Bailey*, out of a sum of 150*l.* then in their hands, and the balance out of the 600*l.*

The hearing of the petition is reported, *ante* 5 N. R. 133.

The Master of the Rolls held, that both the motion and the petition were irregular, on the ground that it was beyond the jurisdiction of the Taxing-Master to entertain the question at all.

The executors now appealed from the orders made on the motion and petition.

Hobhouse, Q.C., and *G. L. Russell*, for the appellants, contended—

1st. On the question of form: it was the every-day practice in the Taxing-Master's office, when trustees or executors had gone into litigation, to consider, whether the expenses were such as could properly be incurred in the administration of the trust estate.

They referred to the fuller form of inquiry, "Let the Taxing-Master inquire whether the [executor] has properly incurred any and what costs, charges, and expenses relating to the administration of the testator's estate beyond his costs of this suit," &c.,

2 Seton, 767, No. 3 (3rd ed.), as showing that the discretionary power of the Taxing-Master was distinctly recognised; the Taxing-Master had a similar discretion as to journeys abroad, retainer of counsel, &c., where the question was not one of amount only, but of the propriety of the thing itself.

There was a similar discretion to disallow costs under the Solicitors' Act, 6 & 7 Vict. c. 73,

Re Clarke, 15 Jur. 1047.

The report of,

Payne v. Little, 27 Beav. 83,

which would be relied upon for the respondents, was incorrect. In that case the costs, charges, and expenses of the executor properly incurred by him in certain suits specifically mentioned were provided for by the order on further consideration: the Taxing-Master refused to allow the costs of other suits not mentioned in the order, and the Master of the Rolls held that the point was decided by their omission. That case was clearly distinguishable from one where the decree or order made no mention of any suit at all.

The Master of the Rolls had said, when he dismissed the petition, that they ought to have got liberty from the Vice-Chancellor to prove for their costs of the suits before him in the suit at the Rolls, but it had been decided in,

Jones v. Jones, 4 N. R. 524,

that it was beyond the jurisdiction of a Judge to give a judicial opinion as to costs in a suit in another Court of co-ordinate jurisdiction: such an opinion could, therefore, be only extra-judicial, and, if so, it was simply useless.

The necessity of defending *Rawlins v. Wickham* was proved by the fact, that the Chief Clerk's certificate in that suit was the only evidence in support of Mr. Rawlins' proof in *Graham v. Wickham*.

They would have appealed at once from the order made on the motion, but a few days afterwards the 600*l.* was carried over to the costs account and they thought that the costs in question would be provided for out of that sum.

2nd. On the merits: they had succeeded in the suit of *Rawlins v. Wickham* in reducing Rawlins' claim by 2000*l.*, and in *Wickham v. Bailey* in getting a receiver appointed, and were, therefore, entitled to costs, just as a receiver who, without the leave of the Court, had engaged in successful litigation, was entitled to costs,

Bristowe v. Needham, 2 Phil. 190.

J. H. Palmer, Q.C., and *Lewin*, for the respondents, contended—

1st. The time was past when the claim of the executors to be allowed their costs of the two suits could be entertained; the executors ought to have obtained leave from the Master of the Rolls to engage in those suits, and to have asked for their costs of them before the Chief Clerk in *Graham v. Wickham*.

2nd. The litigation entered into by the executors was useless; in *Rawlins v. Wickham* they failed both at Law and in Equity, and *Wickham v. Bailey* was only a contentious cross-suit, and was useless and entirely failed.

The principle on which the Master of the Rolls proceeded was a sound one, and was this: that when

an administration suit has been instituted in one Court, and executors have incurred costs, charges, and expenses in another Court, they should ask for their costs in the latter Court, otherwise the merits of the case must be heard over again in the first Court, in order to determine whether the costs should or should not be allowed.

3rd. The executors incurred the costs in question for their own interest as residuary legatees; to allow them those costs would be to make Mr. Rawlins pay the costs of his successful litigation.

Hothouse, Q.C., in reply.

TURNER, L.J., said, that the case involved a question of form and a question of merit. He could not agree with the Taxing-Master's certificate, so far as it stated that the costs of the appellants of *Rawlins v. Wickham* and *Wickham v. Bailey* had been already adjudicated upon. In *Rawlins v. Wickham*, neither the dismissal of the bill by the Vice-Chancellor, nor the order made by their Lordships on appeal affirming the Vice-Chancellor's decree, was any decision whatever, of either Court, that the costs of the executors of that litigation were not to be ultimately allowed. The Court did not take upon itself to declare in the decree dismissing the bill that, notwithstanding that decree, the executors were to be allowed their costs. That would be going beyond the ordinary practice, and the parties who would be affected by the allowance of the executors' costs were not before the Court in the suit in which the decree was made; if the Court in *Rawlins v. Wickham* had declared that the executors were entitled to their costs of that suit, injustice might have been done to the separate creditors in *Graham v. Wickham* by allowing as against them the costs of defending a suit instituted by a joint creditor. He agreed, however, with the Taxing-Master that there was an important question,—viz., whether the costs had been incurred by the executors in their fiduciary position, or for their personal benefit.

The Master of the Rolls had refused the applications made by the executors, on the ground that he had no jurisdiction to allow the costs of suits carried on in another branch of the Court; for the Court which had disposed of the original suit, the costs of which were sought to be allowed, ought, if it had intended to allow such costs out of the testator's estate, to have expressed that intention in the decree.

He did not think that opinion of the Master of the Rolls was conformable to the practice of the Court for there must be many cases of claims against trustees and executors, where they ultimately failed in their defence; but where, as between themselves and the estate, they were entitled to be allowed their costs. In the case of an action of ejectment, for instance, the costs of defending the estate against an adverse plaintiff, ought to be allowed as against the parties beneficially interested in the estate.

There was a difficulty in determining whether the

costs of opposing such claims were items which ought to be brought in under the head of just allowances; in many cases they might well be claimed, as where an action was brought against the estate before the administration suit was instituted, and the executor had paid the costs of opposing it,—upon the principle of *Fearn v. Young* (10 Ves. 184); but it did not follow that where the whole matter had not been wound up before the institution of the suit, costs subsequently incurred could be properly claimed as just allowances; and the executors could not do so in the present case, for the decree had been made in *Graham v. Wickham*, before *Rawlins v. Wickham* was instituted.

An application had been made by petition in *Graham v. Wickham*, for payment to the executors in respect of their costs of part of the sum of 600*l.*, which had been carried to the costs account. *Graham v. Wickham* was then going on, and the estate could not be wound up. The Master of the Rolls dismissed that petition with costs, on the ground that to allow the costs would be tantamount to altering the decree. He thought, that the Master of the Rolls was wrong, for an order might have been made on that petition, without altering the decree, for payment of the executors' costs out of the 600*l.*

But the real question was on the merits. As to *Wickham v. Bailey*, when that suit was instituted by the executors, Mr. Rawlins had filed a bill for a declaration that no partnership had existed, and for the appointment of a receiver of the partnership assets. The executors were defendants to that bill, and when they afterwards filed the bill in *Wickham v. Bailey*, to take the partnership accounts, and for the appointment of a receiver, they knew that there was already a bill on the file asking for a receiver, which was in fact the substance of their own bill, for when a receiver was appointed, they submitted to the dismissal of their own suit. But, before instituting that suit, they ought to have applied to Rawlins to move to appoint a receiver of the partnership estate; and not to have incurred the expense of a new bill without first endeavouring to save expense by saying that they were ready to agree to the appointment of a receiver if Rawlins would move. He thought, therefore, that they were entitled to no costs of that suit.

As to *Rawlins v. Wickham*, Rawlins had made a claim against the testator's estate for 13,000*l.* The claim involved a question of liability and of account. As to the liability, an action had been brought against Bailey and the testator: the testator died before the trial. The action went on against Bailey, and a reference was made to ascertain the amount due to Rawlins from Bailey. The executors appeared before the arbitrator, and he thought that as a judgment had been recovered at Law against Bailey, and there was a suit then instituted for the administration of the testator's estate, the executors were not justified in defending *Rawlins v. Wickham* without first applying for the

leave of the Court in *Graham v. Wickham*. If they had acted simply and entirely for the interest of the creditors and legatees, and not for themselves, they would have applied to the Court. But instead of doing so, they put in a defence and disputed payment of Rawlins' debt; so far, therefore, as the suit related to the liability, the executors were wrong in defending it, and should not be allowed their costs.

On the other hand as to the accounts, a claim had been carried in by Rawlins in *Graham v. Wickham*, and adjourned till after the decision in *Rawlins v. Wickham*: it was therefore necessary, in order to ascertain what was due from the estate of the testator to Rawlins, that an inquiry should be made in *Rawlins v. Wickham*, and so far as the decree in *Rawlins v. Wickham* directed such an inquiry, the costs of the executors should be allowed.

The executors ought to have appealed at once from the order made on the motion, and were not entitled to their costs of the subsequent petition.

Knight Bruce, L.J., said, that he also thought that the Master of the Rolls was not precluded from entering into the merits of the case, either on the motion or the petition. On the merits, he agreed with the Lord Justice so far as he had dissented from the course taken in the Taxing-Master's office and at the Rolls, but he thought that there was perhaps enough in the case to warrant the Court in doing more for the appeal. He assented to the order proposed, without saying whether it ought or ought not to have gone further.

Minute.—The costs of the motion below to be returned. The executors to be allowed no costs of *Rawlins v. Wickham* up to the hearing, but to be allowed their subsequent costs. Executors to have also the costs of the motion below, but no costs of the petition or of the appeal. Discharge both orders of the Master of the Rolls. Declare that the costs which the executors are to have are costs in the suit of *Graham v. Wickham*. Tax them accordingly.

Note.—The order on further consideration made in *Payne v. Little* and four other suits, directed the Taxing-Master to tax the costs of John Little and his co-executor in all the five suits; the costs in the first-mentioned suit (the administration suit) to include any costs, charges, and expenses properly incurred by them respectively in the execution of the trusts of the testator's will, but the Taxing-Master was not to allow them any costs, charges, or expenses of a suit of *Greville v. Spooner* mentioned in the order; see Reg. Lib. 1857, B. fol. 1590. It appears, therefore, that the four other suits mentioned in the order, and of which the costs were directed to be taxed, were suits in which the order itself was made, and the costs of which were provided for by the order in the usual way; so that no inference can be drawn, as argued for the appellants, from the mention of those suits

in the order, as to the costs of suits not mentioned in the order. If any inference of that kind were to be drawn, it would be that as the Court disallowed the costs, charges, and expenses of the executors in *Greville v. Spooner*, it intended to allow them, if properly incurred, in any other suits not mentioned in the order. Mr. Beavan's report of *Payne v. Little* seems, therefore, to be correct.

Lords Justices. } HUNT v. MANIERE.
28 JAN. 1865. }

Principal and Agent—Injunction—Action at Law—Delay.

In this case, which is fully reported in the Court below, 5 N. R. 181, their Lordships, without giving any judgment as to the merits of the case, considered that the proper course was to continue the injunction until the hearing of the cause; and if the Master of the Rolls should think proper, their Lordships considered that this cause, and that of *Ponsardin v. Stear*, might be advantageously heard together, with the assistance of a Common Law Judge. The question of costs to be dealt with by the Master of the Rolls at the hearing.

Lords Justices. } *Re THE HACKNEY CHARITIES*
13, 14, 31 JAN. 1865. } (POOLE AND WHITE'S CHARITIES).

Appeal from the Board of Charity Commissioners—23 & 24 Vict. c. 136, s. 8—Legal Estate in Charity Land—59 Geo. 3, c. 12, s. 17.

The Charitable Trusts Act, 1860, s. 8, does not give a right of appeal to any two inhabitants of a parish or district in which the income of a charity is applicable, unless the gross yearly income of the charity exceeds 50l.

Quære, under what circumstances churchwardens and overseers of a parish are, under 59 Geo. 3, c. 12, s. 17, a corporation within 16 & 17 Vict. c. 137, s. 48.

This was an appeal from the order of the Master of the Rolls, reported 4 N. R. 530, where the facts of the case are fully stated.

The Attorney-General, Hobhouse, Q.C., and T. H. Terrell, for the appeal contended—

1st. The true construction of 23 & 24 Vict. c. 136, s. 8, was to give a right of appeal to two inhabitants of any parish or district in which the income of any charity should be specially applicable, provided that such income exceeded 50l., but not otherwise. In the present case the gross annual income was less than 50l., although it might soon be very much increased by letting the land on building leases, but that could only be done by the order of the Charity Commissioners.

2nd. The legal estate in the freehold land was not vested in the churchwardens and overseers previously

to the order of the Commissioners, as held by the Master of the Rolls, or, if so, it was not vested in them as a corporation within the meaning of

16 & 17 Vict. c. 137, s. 48.

Their claim to be a corporation was founded on 59 Geo. 3, c. 12, s. 17,

which was a Poor-law Act, although the words "and also all other buildings, lands, and hereditaments belonging to the parish," had been held to enlarge the meaning of the section,

Doe d. Jackson v. Hiley, 10 B. & C. 885.*

The section empowered the churchwardens and overseers of a parish to accept, hold, and take the buildings, &c., belonging to the parish, in the nature of a body corporate. A parliamentary position was created for them, making them a quasi-corporation, to give them a *locus standi in curia* for particular purposes, but they were not a corporation,

Smith v. Adkins, 8 M. & W. 362;

Ex parte Annesley, 2 Y. & C. Ex. R. 350.

And the charity lands in the present case were not lands "belonging to the parish," as explained and illustrated by other sections of the Act, 59 Geo. 3, c. 12, ss. 8, 9, 12, 24, 25.

3rd. The dole or distribution under these charities was inconsistent with the nature of parish property. On this point,

Doe d. Jackson v. Hiley (*loc. cit.*),

only determined that property applicable in aid of church-rates was on the same footing as property applicable in aid of poor-rates. That case was followed in

Doe d. Higgs v. Terry, 4 Ad. & E. 274,

Doe d. Hobbs v. Cockell, 4 Ad. & E. 478,

where the lands were described as "belonging to the parish church."

But the rule deducible from the cases was, that charity lands, the income of which was applicable to special purposes, as in

Attorney-General v. Lewin, 8 Sim. 366,

Re Paddington Charities, 8 Sim. 629,

or the legal estate of which was vested in known and existing trustees, as in

Allason v. Stark, 9 Ad. & E. 255,

were not within the Act.

The decision in

Alderman v. Neate, 4 M. & W. 704,

did not raise this point, for the parish officers had been in possession and paid rent for fifty years.

The rule had been followed in

The Churchwardens of Deptford v. Skitchley, 8 Q. B. 394,

explaining

Rumball v. Munt, 8 Q. B. 382.

They also referred to

The King v. The Inhabitants of Halesworth, 3 Barn. & Ad. 717,

as a decision *in pari materia*.

4th. The Master of the Rolls had been of opinion

that the Charity Commissioners ought not to have made their order, as the case was one of a contentious character, but under

23 & 24 Vict. c. 136, s. 5,

the Commissioners were themselves made the Judges of what cases were proper to be referred to one of the Judicial Courts.

Selwyn, Q.C., and *Prendergast*, for the respondents, contended,

1st. The division of the parish being for ecclesiastical purposes only,

Queen v. Archdeacon of Exeter, 1 N. R. 267,

the charity lands if vested in the churchwardens and overseers would be vested in them on behalf of the whole parish: the parish was now represented by a select vestry of 120 persons, on whose behalf the petition at the Rolls was really presented. The section in question,

23 & 24 Vict. c. 136, s. 8,

was quite ungrammatical, and the construction put upon it by the Master of the Rolls was at least an intelligible one, and supported the substantial merits of the case, for the real yearly value of the land was very much above 50*l.*, and the Act could not refer simply to the actual yearly value, for then the right of appeal might be taken away by such contingencies as a fire or the bankruptcy of a tenant.

2nd. Whether the overseers and churchwardens were a corporation or not, they were a corporation for the purposes of the present application. In

Doe d. Higgs v. Terry, loc. cit.,

Patteson, J., said, upon the authority *Doe d. Jackson v. Hiley* (*loc. cit.*), that parish property belonged to the churchwardens and overseers as a corporation, and in

Rumball v. Munt, loc. cit.,

he explained the meaning of the "lands, &c., belonging to the parish," as applying to all cases where the lands were given for the use of the parish generally, though not to those where the trusts were for purposes not entirely parochial. The charities in the present case were quite within that definition.

3rd. They did not, by appealing to the Master of the Rolls, admit the jurisdiction of the Charity Commissioners to make the order. The case was one of a contentious character, and to say that the Commissioners were to be judges of that, was to make them the judges of their own cause.

The Attorney-General, in reply.

Knight Bruce, L.J., said, that, subject only to one question, he thought that the order of the Charity Commissioners was reasonable and convenient, and ought to be supported. The question was, whether the Charity Commissioners had by law jurisdiction to make it; if so, there was nothing of importance to be said against it; but even if the Commissioners had no jurisdiction to make the order, he thought that the Court ought not to discharge it. The petitioners were

merely two private individuals of the parish of Hackney. Their petition had not the concurrence of the Attorney-General, and was opposed by him. The Attorney-General desired that the order of the Commissioners should stand, and the trustees appointed by the Commissioners were willing to act. Under such circumstances, his Lordship thought that the course most consistent with the well-being of the charity was to decline to interfere, and that whether the order of the Commissioners was regular or not, the order discharging it had better be discharged. The Court below was not, on the petition before it, under the judicial necessity of discharging the Commissioners' order.

TURNER, L.J., said that he thought that it was not competent for the two inhabitants to appeal to the Master of the Rolls. The jurisdiction of the Board of Charity Commissioners was wholly statutory, and the right to appeal from their orders was also founded on the statutes which regulated the Board.

The Master of the Rolls had construed the 8th section of 23 & 24 Vict. c. 136, as divisible into three parts, and giving three distinct rights of appeal: first, to the Attorney-General, or to any person authorised by him, or by the Board of Charity Commissioners in the case of any charity, whatever might be the income of its endowments: secondly, to any trustee, or person acting in the administration of, or interested in, any charity, of which the gross yearly income should exceed 50*l.*: thirdly, to any two inhabitants of any parish or district in which the charity should be applicable, *whatever the amount of its income might be*. He could not agree with that construction of the section. The section, in his opinion, gave a right of appeal: first, whatever the yearly income might be, to the Attorney-General, &c.: secondly, when the income exceeded 50*l.*, to any trustee, or to any two inhabitants of the parish or district in which the *income* was applicable. The latter construction was, he thought, more consistent with the collocation, and with the terms of the section, than that adopted by the Master of the Rolls. It would be difficult to contend, that there was an intention to give an unlimited right of appeal to any two inhabitants, thus giving: first, an unlimited right of appeal to the Attorney-General, &c.: secondly, a limited right to any trustee, &c.: thirdly, an unlimited right to any two inhabitants. As to the language, he thought that the word "same" referred to the "income," and not to the "charity," on the well-established rule of construction, that relative words should be referred to the last antecedent.

The Legislature had made a distinction between charities with incomes above and below 50*l.* This was in order to prevent the funds of the smaller charities being wasted in litigation; the smaller charities were protected by the Attorney-General and the Board of Charity Commissioners, under the first clause of the section. The intention of the Legislature in this

respect was obvious, from the provisions of the earlier Acts.

Some attempt had been made by the respondents to show that the income was above 50*l.*; but that was not so at present, and the case must be dealt with on the actual income.

The objection, that both charities were included in one order, was not well founded.

Minute.—Discharge the order of the Master of the Rolls. Dismiss the petition of the respondents with costs. No costs of the appeal.

Note.—See also,

The Attorney-General v. Salkeld, 16 Beav. 554.

Master of the Rolls. } *Re* MAY.
28 JAN. 1864.

*Solicitor—Taxation—Summons in Chambers—
General Order of 2nd August, 1864.*

Where a solicitor retains money, received for his client, in payment of costs alleged to be due to the solicitor, an application for the delivery and taxation of the bill, and for payment of the amount retained in excess, is an application under the 6 & 7 Vict. c. 73; and therefore, since the General Order of the 2nd of August, 1864, such an application must be made by summons in Chambers, not by petition.

According to the statements in this petition, Mr. May had taken a transfer of a mortgage for 430*l.* upon property belonging to the petitioner, and had afterwards acted as solicitor to the petitioner, from February to May, 1864, and had made small advances of money to him: Mr. May had, however, received several sums for or on account of the petitioner, exceeding the sums which he had advanced to the petitioner, including the 430*l.*, by 217*l.* 5*s.* 3*d.*; and out of this amount Mr. May claimed to retain 170*l.*, as due to him from the petitioner for certain costs, of which he had not delivered any bill.

The prayer of the petition was for the delivery and taxation of the bill of costs, and for payment to the petitioner of the excess of the 170*l.* retained over the taxed amount of the bill.

Selwyn, Q.C., and *E. K. Karlake*, for Mr. May, took the preliminary objection, that this application came within the General Order of the 2nd of August, 1864, par. I.† and ought to be made by summons at Chambers.

Southgate, Q.C., and *Jolliffe*, for the petitioner, contended, that the present application was addressed to the general jurisdiction of the Court over solicitors, not to the jurisdiction given by the 6 & 7 Vict. c. 73. The petition was one for an account against Mr. May.

† See Appendix.

If Mr. May had not been a solicitor, it would have been a case for a bill.

THE MASTER OF THE ROLLS said, that, in his opinion, this was an ordinary petition for the taxation of a bill, and one upon which, but for the recent General Order, the Court would have had power to order the taxation of the bill. If the contention of the petitioner's counsel were well founded, no order ought to have been made upon such a petition as this, even before the General Order. But there were various cases in Mr. Beavan's reports, in which both Lord Langdale and he himself had repeatedly treated similar applications, as ordinary cases of taxing a solicitor's bill. Unless the order for taxation in such a case was made under the Act, it was difficult to see how it could be made at all. The cases in which the Court made orders against solicitors upon summary applications, were altogether distinct. In those cases—*e. g.*, where, upon a purchase, a solicitor had retained part of the purchase-money, or where a sum of money had been given to a solicitor for a particular purpose—the Court made an order for payment, not for taxation. In the present case, the petition prayed for taxation; and the case clearly came within the terms of the General Order. He was of opinion that he could not entertain the petition, and that the petitioner must apply at Chambers.

Minute.—Dismiss petition with costs, without prejudice to any application which the petitioner may be advised to make at Chambers.

Master of the Rolls. } *Re* CHAMBERS.
31 JAN. 1865.

Solicitor—Taxation—Substituted Bill.

A solicitor cannot ordinarily withdraw one bill of costs and substitute another with reduced charges.

A solicitor was, under the circumstances, allowed to do so before taxation was commenced, on payment of all costs up to the date of such substitution.

Henry Thomas Chambers, a solicitor at Lincoln, was retained in 1859 by one R. Graves. The business, which was difficult, and involved a suit in Chancery, was successfully concluded in February, 1864. Graves admitted that he had promised that Chambers should be liberally paid, but denied, what Chambers asserted, that Chambers had been promised 100*l.* above his bill of costs. On the 19th of November, 1864, Chambers sent to Graves a bill of costs, amounting to 571*l.* 16*s.* It was unsigned and sent by book post, but a letter referring to it was sent by the same post. On the 9th of December, Graves' solicitors wrote to Chambers, stating that the bill was excessive. A correspondence subsequently ensued between the respective solicitors of Graves and Chambers, beginning on the 19th of December, and ending on the 21st of December, 1864. One of the letters dated the 20th of December, written

by Chambers' solicitors, contained, in the opinion of the Master of the Rolls, an admission that the bill sent on the 19th of November would not bear taxation. An offer to refer the bill to a solicitor was declined on behalf of Graves, upon which Chambers' solicitors said that the matter must take the usual course. On the 23rd of December, the Taxing-Master's offices closed. On the 29th of December, Graves' solicitors applied at the Rolls for the common order to tax, but in consequence of the Christmas Vacation, could not obtain an order until on or about the 5th of January, 1865. The order was, however, dated the 29th of December, 1864. The Taxing-Master's office re-opened on the 7th of January, the order was at once carried in, and on the 9th of January, a reference was obtained, and a warrant to tax the bill issued. Copies of the warrant and order were sent to Chambers' solicitors on the same day; but, in consequence of their refusal to accept service, had to be sent to Lincoln, and were there served on Chambers on the 11th of January.

In the meantime, on the 6th of January, Chambers sent to Graves a second bill of costs, together with a notice that he withdrew the first bill delivered on the 19th of November, and that he intended to substitute the second bill in lieu thereof, and that his claim was limited to the amount of this second bill. This second bill, which amounted to 478*l.* 18*s.* 4*d.*, was also accompanied by a letter, acknowledging that in consequence of Graves' promise of liberal payment, items had been inserted in the first bill which would not be allowed on a strict taxation, although Chambers considered he was fairly entitled to them.

There had also been some negotiations about referring the matter to arbitration; but the Master of the Rolls considered that no agreement to refer was proved. Chambers also stated, in his affidavit, that he had a claim against Graves for other professional charges, but the Master of the Rolls overruled the argument on this point without hearing Graves' counsel.

On the 19th of January, Chambers gave notice of motion that the order of the 29th of December, 1864, might be discharged, and all further proceedings under it stayed, or that the Taxing-Master should be directed to tax the second bill, instead of the first bill, and that Graves might be ordered to pay the costs of the application.

Selwyn, Q.C., and *Nalder*, now moved accordingly.

The first bill was delivered on the faith of Graves' promise that we should be paid more than we were strictly entitled to on taxation. When it was objected to, we admitted it would not bear taxation, and then, before taxation could be begun, we withdrew it, and delivered the second bill. As we did this, Graves ought to have taken in the second, not the first bill, to be taxed.

Baggallay, Q.C., and *F. Webb*, for Graves, supported the order.

A solicitor who has delivered his bill is bound by

it, and cannot reduce his demand, or reserve the power of delivering another bill containing other charges,

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Chambers insisted on his first bill until the last moment, when he saw that taxation was insisted on.

Selwyn, Q.C., replied as to the costs of the motion.

THE MASTER OF THE ROLLS said, that, the sole question he had now to consider was, whether the order of taxation should refer to the first or the second bill, which in reality was, who was to pay the costs of taxation. A solicitor could not deliver a bill, and then, when objection was made to it, deliver another with reduced charges. If he did so, he must pay all the costs occasioned by the delivery of the first bill. His Honour quite agreed with the rule laid down by Lord Langdale in *Re Carven* (*loc. cit.*), as to the substitution of one bill for another; but the rule did not mean that it could never be done, for if the solicitor had made a mistake and wished to correct it, and, before the taxation was begun, made an application to the Court to be allowed to do so, the Court, if the transaction was *bond fide*, would allow the correction to be made, and the second bill to be taxed instead of the first. In the present case the first bill, when objected to, was admitted to be unfit to bear taxation, and the second bill and accompanying notice and letter were delivered to Graves on the 6th of January, before the Taxing-Master's offices were re-opened, and before any reference had been obtained or the order served. It must be assumed that such delivery was known to Graves' solicitors on the 7th of January; they ought then to have accepted the second bill, and not gone on with the order to tax the first bill; for taxation was not a vindictive proceeding, but only a mode of ascertaining what it was fair to pay. His Honour would order the second bill to be substituted for the first in the order for taxation, but Chambers must pay all the costs of Graves up to and including the 7th of January. The case should never have come into Court, and he should, therefore, give no costs of the motion.

Kindersley, V.-C. } *Re BIRKBECK LIFE ASSURANCE COMPANY.*
28, 31 JAN. 1865. } *BARRY'S EXECUTORS.*

Winding-up—Contributory—Costs.

There is no exception to the general rule, that "the unsuccessful party shall pay costs," in the case of a person who unsuccessfully resists being placed on the list of contributories.

This was a summons, adjourned from Chambers, upon the point whether the legal personal representatives of a Mr. R. T. Barry, deceased, should be placed upon the list of contributories to the above company. The representatives of Mr. R. T. Barry, being placed on the list of contributories, objected thereto, on the

ground that this was not the Mr. Barry who was a shareholder in the company. The identity, however, was established to the satisfaction of the Court; and the question arose, whether the unsuccessful parties should pay the costs of the opposition.

Stallard and Jessel, for the official manager, referred to *Lindley on Partnership*, 1144, and cases there cited.

Glasse, Q.C., and *Freeman*, for the representatives of Mr. R. T. Barry, urged, that the cases cited were cases of appeal motion from the Master; whereas the present case was no appeal, but an adjournment into Court.

THE VICE-CHANCELLOR, said, he would look into the practice on the point.

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KINDERSLEY, V.-C., said, the only question was, what course was to be adopted with regard to the costs. There was no doubt that in some, if not all, of the Masters' offices there had been a tendency not to make a contributory pay the costs of an unsuccessful resistance; but there had also been a tendency not to give the costs of a successful resistance, as it was considered that the party was sufficiently fortunate in escaping from contribution. Such had been the practice, though the grounds were not very satisfactory. He did not, however, find that there was at present any fixed practice; though in many cases the unsuccessful party had, upon special circumstances, been excused from paying the costs. The general rule of the Court was, of course, that the unsuccessful party should pay the costs; and he did not see any reason why, in the absence of special circumstances, that rule should not apply to cases of winding-up. He thought that, on the whole, the rule to be applied here, was the general rule; and, as in the present case there was no special ground for exemption, Mr. R. T. Barry's representatives must pay the costs.

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26, 27, 28 JAN. 1865. }

Advancement—Present Intention—Release of Equitable Interest to Trustee—Evidence.

Where one claimed as an advancement shares purchased in his name by an elder brother, and also alleged a gift of them seven years after the purchase, and stated his belief they were intended to be ultimately for his benefit:—

Held, no advancement.

Unsupported evidence of donee of a parol gift, together with delivery of a part, not sufficient evidence of a gift of the whole.

Seemle, on a question of gift, subsequent statement of donor admissible.

The bill was filed by an executrix, claiming as assets

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Where one claimed as an advancement shares purchased in his name by an elder brother, and also alleged a gift of them seven years after the purchase, and stated his belief they were intended to be ultimately for his benefit:—

Held, no advancement.

Unsupported evidence of donee of a parcel gift, together with delivery of a part, not sufficient evidence of a gift of the whole.

Semble, on a question of gift, subsequent statement of donor admissible.

The bill was filed by an executrix, claiming as assets

certain shares which the defendant retained under the following circumstances :

The defendant was a younger brother of the testator, who, in 1848, the father being then dead, and the defendant having very little income, took him to live in his house, and at his expense, and subsequently said "he would provide for him." In 1851, the testator married the plaintiff, but the defendant continued to live with him, following no occupation, until 1858.

In 1853, the defendant being then a shareholder in the South Wales Railway Company, the testator applied in his name for sixty-four shares. The shares were registered in the defendant's name ; but the testator paid for them, kept the certificates, and received the dividend warrants. While the defendant lived with him, the testator cashed the warrants himself ; but from the time when the defendant left his house, he sent them to him, and the defendant applied them to his own use.

In December, 1860, the defendant stayed with the testator about a week, and during the visit the testator (as he said) gave him all the South Wales Railway shares, saying, "There are those South Wales shares standing in your name, and I give them to you now." Subsequently the defendant having received from the testator the key of the box containing the certificates, in his presence took out fourteen of them, which he retained, leaving the rest.

The account of this transaction rested solely on the defendant's own evidence. The gift of the fourteen shares was admitted.

The testator had also purchased some shares in the Taff Vale Wagon Company, which were in like manner registered in the name of the defendant. The testator had always received the dividend warrants on these shares, and had cashed them himself until February, 1863, when he sent the warrant (the last before his death) to the defendant.

In a statement of his property, drawn up in his own handwriting in 1861, the testator set down fifty South Wales Railway shares, standing "in C. B. F.'s (defendant's) name."

The defendant in his answer said, he believed the testator "always intended the South Wales Railway shares and the Taff Vale Wagon shares to be ultimately for his (defendant's) benefit."

Bacon, Q.C., and *C. Hall*, for the plaintiff.

The defendant is trustee for the executrix of the fifty South Wales Railway Shares, and the Taff Vale Wagon Shares.

There was no perfect gift, except as to the fourteen shares,

Irons v. Smallpiece, 2 B. & Ald. 551 ;

Shower v. Pilck, 4 Exch. 478.

Malins, Q.C., and *F. C. J. Millar*, for the defendant.

The purchase by the testator in the defendant's

name was an advancement, the testator having placed himself *in loco parentis*,

Currant v. Jago, 1 Coll. 261.

This being personal estate, the absence of written evidence of advancement is immaterial,

Benbow v. Townsend, 1 Myl. & K. 506.

The receipt of the income by the donor does not rebut advancement,

Benbow v. Townsend, loc. cit. ;

Sidmouth v. Sidmouth, 2 Beav. 447.

Subsequent declarations or acts of the testator are not admissible to rebut the presumption,

Finch v. Finch, 1 Ves. jun. 534 ;

Christy v. Courtenay, 13 Beav. 96 ;

Crabb v. Crabb, 1 Myl. & K. 511 ;

Sidmouth v. Sidmouth, loc. cit.

If there was no advancement, then there was a gift in December, 1860, of all the South Wales Railway shares.

STUART, V.-C., without calling for a reply, said, the defendant put his case in two ways, which were inconsistent with each other. As to the first, to support the claim of advancement, even if it were assumed that the testator stood so far *in loco parentis*, that the purchase in the name of the defendant might raise the presumption ; still there must be the actual intention at the time to advance. Now such an intention did not consist with the defendant's own belief that the shares "were intended to be ultimately for his benefit" ; still less with the gift alleged to have been made seven years after the investment. He could not, therefore, hold that there had been an advancement.

On this view, the defendant at the time of the transaction in December, 1860, was a trustee of the shares. The question then arose, whether that transaction was a gift of all the South Wales Railway shares. No authority had been cited to show what would be a good release of the equitable interest to the trustee. Cases at Law could not directly apply to an interest not recognised at Law ; but it appeared from *Shower v. Pilck* (*loc. cit.*), that at Law there might be a gift which should fail for want of delivery. Now the doctrine of gift in a Court of Equity did not differ materially from the doctrine at Law, and the Court would not perfect an imperfect gift. The gift here alleged rested on the defendant's evidence only, and was made, on his statement, by a parol release, and by acts which were fully satisfied by what actually took place,—viz., the removal of fourteen certificates. Would this support a gift of those shares which remained in the same situation ? It would be dangerous to hold that the donee's unsupported evidence of a gift by words (so easily misunderstood), with delivery of a part, was sufficient proof of a gift of the whole. He must hold that the gift was imperfect as to those which remained in the testator's possession. As to the admissibility of the subsequent statement of the testator, the case of *Devoy v. Devoy* (3 Sm. & G. 403),

where the donor was still living, did not apply to the present one. He thought, however, that on a question of gift the evidence was admissible, though of little value. All the shares must be delivered up to the plaintiff. The testator having created the difficulty, and the defendant being in the position of a trustee, plaintiff and defendant might have their costs, as between solicitor and client, out of the estate.

Wood, V.-C. } **HEPBURN v. LORDAN.**
19, 21 JAN. 1865.

Injunction—Nuisance—Indictment.

In the case of a nuisance dangerous to property, the Court granted an interlocutory injunction on the plaintiff giving an undertaking to indict the defendant forthwith for a nuisance at Law, and the usual undertaking as to damages.

The plaintiff and defendant were owners of adjacent premises. Property to the value of 80,000*l.* was stored on the plaintiff's premises. The defendant had stored a large quantity of wet jute on his premises, for the purpose of drying it. Eight fires had occurred within the last two or three years in places where jute had been stored, involving a loss of upwards of a million and a half; but it was not actually proved that such fires originated with the jute. The jute in question was saved from one of these fires, but was damaged with water. Other parcels of this very jute had caught fire since they were saved from the original fire. An insurance office in which the plaintiff was insured had given notice, that in consequence of the danger to which his premises were exposed, it would no longer continue his policy, unless at a higher rate; and other offices had threatened to give similar notices. An extra fire engine had also been kept by the Fire Brigade on the plaintiff's premises. It was admitted that jute would spontaneously ignite in the country where it is produced, but it was not proved that it would ignite spontaneously if brought to this country and then wetted. Dr. Taylor stated in an affidavit that he did not know of any well authenticated case of spontaneous ignition of jute.

W. M. James, Q.C., and *Winterbotham*, moved for an injunction to restrain the defendant from allowing the jute to remain on his premises, on the ground that the damage which would be done to the plaintiff's property, if the jute were to catch fire, would be irreparable. They cited,

Crowder v. Tinkler (The Gunpowder Case),
19 Ves. 617.

H. Palmer and Boyle, for the defendant, argued;

The Court cannot be influenced by the fears of mankind, though they may be reasonable,

Anon. 3 Atk. 750.

The right must be established at Law before the Court will grant an injunction,

Attorney-General v. Cleaver, 18 Ves. 220;

Broadbent v. Imperial Gas Company, 7 De G. M. & G. 436.*

An injunction will not be granted against a mere contingent risk,

Lord Ripon v. Hobart, 3 Myl. & K. 169;

the plaintiffs will have a sufficient remedy at Law,

Isenberg v. East India House Estate Company (Limited), 3 N. R. 345.

James, Q.C., in reply.

21 JAN. 1865.

WOOD, V.-C., said, that the question was, how far this was a matter which would be indictable at Law, and cited *Regina v. Lister and Biggs* (1 Dears. & B. C. C. 209), the case of an indictment for keeping naphtha. In a case like the present, where there was only a balance of convenience on the part of the defendant against the risk run by the plaintiff, the Court would be bound to interfere if the matter was one that would support an indictment at Law. He should, therefore, grant an injunction to restrain the defendant from bringing any damp jute upon the defendant's premises, and from allowing the jute now there to remain in such quantities as to endanger the plaintiff's adjoining premises and property, the plaintiff giving the usual undertaking as to damages, and undertaking forthwith to indict the defendant in respect of the matters complained of in the bill as a nuisance at Law.

W. M. James, Q.C., suggested that the Court was bound to try the question as to the nuisance itself, instead of sending the parties to Law,

25 & 26 Vict. c. 42.

HIS HONOUR declined to accede to that proposition.

*Note.**—See also,

Elmhirst v. Spencer, 2 Mac. & G. 45.

Wood, V.-C. } **RENARD v. LEVINSTEIN.**
26 JAN. 1865.

Licensee of Patent—Injunction.

An exclusive licensee of a patent is entitled to an injunction to restrain an infringement of the patent.

This was a bill by *M. Renard* the owner of a patent, and *Mr. Nicholson* his sole licensee in England, for an injunction against the defendant *Hugo Levinstein*, who, as the plaintiffs allege, had infringed the patent.

After the filing of the bill *M. Renard* assigned the patent to the *Fuchsine Company*, and the bill was amended by order on the 12th of December, 1864, stating this fact, and joining the *Fuchsine Company* as defendants.

The assignment was duly registered at the Patent Office, and, by a simultaneous unregistered deed, a right

of reverter to Renard was declared upon breach of condition.

The usual issues had been decided by the Court in favour of the plaintiffs.

Giffard, Q.C., Cairns, Q.C., and Drewry, on behalf of the plaintiffs, moved for an interlocutory injunction, the cause not being ripe for hearing.

J. Johnston, for the Fuchsine Company, in the same interest with the plaintiffs.

Jessel and Bagshawe contra.

The case is not one for an interlocutory injunction, for the present plaintiffs can never obtain an injunction. As the bill was originally framed it was immaterial, but now becomes material, to consider, whether a licensee can maintain such a bill. He cannot sue at Law, and, therefore, has no right in Equity to an injunction, which is only given in aid of a legal right.

A licensee is simply a person who is not an infringer. A licence to use a patent is a mere right to use or do something which other persons cannot. There were instances like,

Newby v. Harrison, 1 J. & H. 393; on appeal, 4 L. T. (N. S.) 424,

in which the licence amounted to a grant, and then, perhaps, a licensee might have some *locus standi*, but certainly not in the case of a licence to use a patent; for it was the object of the patentee to keep the property in his own hands. Under the old law you could not assign a patent to more than twelve persons, but might grant as many licences as you liked. This showed the great distinction between an assignment and a licence.

No injunction ought to be granted, or if his Honour

should be against them on that point, it ought only to be granted on an undertaking as to damages.

Giffard, Q.C., in reply.

The plaintiff, Nicholson, has an equitable interest in the patent, for what difference can there be between an exclusive licensee and an equitable owner? Lord Campbell, in *Newby v. Harrison* (*loc. cit.*), distinguished that case from the case of an exclusive licensee. As to the old law,

Hindmarch on Patents, 238.

The case of

Protheroe v. May, 5 M. & W. 675,

referred to by the Vice-Chancellor, was not the case of an exclusive licensee, but an exclusive licensee within a certain radius.

WOOD, V.-C., said, that the only difficulty was with regard to the application being by a licensee. Mr. Jessel was, perhaps, right in saying that there was no instance in which an injunction on such an application had been granted. The relief asked, however, seemed to him entirely consistent with the general principles of the Court. There were instances of relief being granted under somewhat similar circumstances. Suppose A to enter into a contract with B, and then into a different contract with C, inconsistent with the one to B. The Court would not allow C to interfere with the original rights of B. In such a case, A, as a wrong-doer, would not be likely to be a plaintiff. This was the case of a wrong-doer cognisant of the facts; and his Honour had no difficulty in saying, that the plaintiffs had a right to the interference of the Court. As the injunction was granted on an interlocutory application, there must be an undertaking as to costs.

COMMON LAW.

Q. B.
25 JAN. 1865.

THE MAYOR, &c., OF WEYMOUTH,
Appellants v. NUGENT, Respondent.

Prerogative of the Crown—Immunity from Tolls
—Crown not included in Statutes unless named.

The Corporation of W. having laid out money in improving a harbour, and making wharfs, quays, &c., and in making a bridge, were enabled by a Local Act to levy dues upon all ships entering the harbour, and upon goods (stone included) imported into the harbour; and to levy tolls upon cattle using the bridge. The Act exempted from the harbour dues, coal imported for the

use of his Majesty's steam packets, and actually used on board the same; and from the bridge tolls, horses and carriages carrying the royal mails, or attending his Majesty or the Royal Family, or in the service of the army:—

Held, that the dues were not leviable upon stone brought into the harbour and delivered there to servants of the Government to be used only for certain Government works; since the principles, first, that the Crown is exempt from toll, and second, that except in certain cases (of which the present case was held not to be one), the Crown is not bound by an Act of Parliament, unless expressly named therein, were applicable to this case, and that the particular exemptions must be taken to

have been inserted ex abundante cautela, and the maxim expressio unius est exclusio alterius, was therefore not applicable.

A case stated by Justices of the Borough of Weymouth and Melcombe Regis, showed that an information under the 6 Geo. 4, c. cxvi., had been laid before them against the respondent, as commanding officer of the Royal Engineers, in charge of certain stone, for refusing to pay to the appellants on their demand, certain wharfage dues thereon. The stone was brought into the harbour by a barge (but whether the Government or a private individual owned the barge, was not stated) for the use only of her Majesty's Government works at the Nothe; that it was brought from Portland for such use, and delivered there by the orders of the respondent, as such commanding officer of the Royal Engineers, to persons in the employ of the Government for the use of the works. The Justices dismissed the complaint, on the ground that the Act did not give the appellants any right to dues on stone brought into the harbour for the use of Government works, and requested the opinion of this Court thereon.

The 6 Geo. 4, c. cxvi. (local and public), repealing a previous Act, which enabled the Corporation of Weymouth and Melcombe Regis (which corporation had improved the harbour, and made wharfs, quays, &c.) to impose certain dues upon ships entering the harbour, and reciting that the corporation had rebuilt a certain bridge, and required more money to keep up the harbour, bridge, &c., enacted, by section 2, that the wharfage duties and the harbour dues mentioned in the schedules should be demanded and taken upon every ship, barge, or other vessel, which should be brought into the harbour of Weymouth; by section 4, that the corporation might require payment of the several duties upon certain goods (stone included) imported into the harbour; by section 6, that the master, owner, or agent of any ship, who had paid the duties on any goods chargeable, might detain the goods till repaid by the owners of the goods, and if not repaid within five days after demand, might sell the goods, and reimburse himself; by section 21, that the corporation might take certain tolls upon horses, carriages, &c., using the bridge; by section 23, that horses and carriages, carrying the royal mails, and horses and carriages attending his Majesty, or any of the royal family, and horses and other beasts in the service of the army, were exempt from the bridge tolls; by section 29, that the corporation might levy certain duties on all coals brought into and landed within the port in any vessel (except coals imported for the use of his Majesty's steam packets, and actually used on board the same); by section 39, that all dues, penalties, and forfeitures imposed by the Act, might, upon proof of the offence before a Justice of the Peace, be levied by distress and sale of the goods of the party offending.

Lush, Q.C. (J. Brown with him), for the appellants.

The Crown is not entitled to exemption from wharfage dues, there being no words in the local Act to exempt them.

[CROMPTON, J.—Is not this the question,—are there any words in the Act which bind the Crown?]

No.

Regina v. Wright, 1 Ad. & E. 436.

There is no case where works having been made and paid for by private individuals and dues imposed by Act of Parliament, the Crown has been held exempt on using the works, unless exempted by express words in the Act. In railways, if the respondents are right, the Crown can run its own carriages on the rails. So in turnpike tolls the only exemption in favour of the Crown is what is expressly conferred. 3 Geo. 4, c. 126, s. 32, exempts "horses or carriages attending his Majesty, or any of the Royal Family, or returning therefrom." So in section 28 of 10 & 11 Vict. c. 27 (the Model Harbours Act, which is to be incorporated in all future local harbour Acts), there is an exemption in favour of "any vessel belonging to or employed in the service of her Majesty, her heirs and successors, or any member of the Royal Family;" and see section 4 of 17 & 18 Vict. c. 104 (Merchant Shipping Act).

Why these words, if the Sovereign is exempt without them? The old maxim that the Crown is not liable to dues, unless expressly bound, originated when statutes were drawn much more concisely than now, and were meant to be read only by lawyers, and when many things were left in implication, and there were no clauses as now that the singular shall include the plural, &c. Section 29 of the local Act exempts from the dues coals imported for the use of his Majesty's steam-packets; and section 23 exempts horses attending his Majesty from the bridge-tolls; and *expressio unius exclusio alterius*. Hence the Crown by necessary implication must pay for the stone.

[CROMPTON, J.—Do you say the Queen's yacht is liable?]

No, for the Act evidently applies only to merchant shipping. If the respondent is right, the Crown may enter any dock without paying.

[BLACKBURN, J.—Docks are the property of the dock company.]

So here, the harbour is vested in the appellants.

[BLACKBURN, J.—I doubt that.]

Before this local Act passed, the Crown had no prerogative, right, title or interest in the harbour beyond the general public; therefore by this bargain with the mayor, &c., when it gave its consent to this Act passing, it parted with no prerogative. Moreover, even if there were a principle exempting the Sovereign personally, that does not extend to ships carrying stone for State works. This barge belongs to a private individual, and not to the Government.

[This was denied by the Solicitor-General, but the case was argued on the assumption that the barge was not owned by the Government.]

The Solicitor-General (The Attorney-General and Doubl-suell with him) for the respondent.

The Crown is free from all tolls and is not bound by any statute, unless expressly named, with certain exceptions, of which this case is not one,

Magdalen College, Rep. pt. 11, 66b ;

Bacon's Abr. "Prerogative," E. 5 ;

Attorney-General v. Donaldson, 10 M. & W. 117, 123 ;

Brooke Abr. pt. 2, fol. 141 ;

Chitty's Prerog. 366, 376.

[BLACKBURN, J.—Have you a case to show that the Crown is exempted from modern Acts granting tolls ?]

Mr. Lush cannot say when the old maxim ceased.

[BLACKBURN, J.—It was recognised as late as *Regina v. Wright*.]

As to horses in the Government service, see

Regina v. Cook, 3 T. R. 519 ; and

Westover v. Perkins, 2 El. & El. 57,

as to the Queen's own horses.

This is an ancient and public harbour, and is not vested in the corporation, and if the appellants are right, the Queen's yacht would be liable for her personal luggage.

[BLACKBURN, J.—From the schedule, I think not.]

The power in the local Act for sale of the goods of the party not paying the dues, shows that the Crown could not be included.

Lush, Q.C., in reply.—The *Magdalen College Case* was on the restraining statute of 13 Eliz. The Crown is deprived of no prerogative here.

[CROMPTON, J.—But I always thought it was a stronger measure to charge the Crown, than to take away a prerogative.]

This case comes within the exception in Bac. Abr., that where a statute is made for the public good, the king is bound, though not named. The tolls are collected for the public benefit,—viz., keeping up the harbour and paying the debt. Of course, the Crown is not included in the taxation for State purposes, but there is no analogy between local dues and taxation for the realm. In a charter granting tolls, no doubt, the Crown is not bound when not named, but the rule does not apply to statutes.

COCKBURN, C.J.—I think the decision of the magistrates was right. There are two great principles or rules applicable to this case, which have prevailed from the earliest times. The first is, that the Crown is exempt from tolls, unless bound by express provision ; the other is, that except in certain cases the Crown is not bound by an Act of Parliament, unless expressly named therein. This is a case where the question arises, whether the Crown, by one of its servants acting in the service of the Crown, is liable for tolls. It may be said, and perhaps with truth, that the doctrine of the immunity of the Crown from tolls arose when tolls were leviable by grants from the Crown, or by prescription, which supposed a previous grant from

the Crown ; and, therefore, it might well be that when tolls were granted by the Crown, the Crown cannot have intended to include itself as liable. Whether that was the origin of the doctrine or not, it has come down from the oldest times, and we can hardly think that the Legislature would have taken upon itself to contravene that principle, and to make the Crown liable to tolls by an Act which granted tolls to the subject, without any mention of the Crown at all. But supposing those who represent the Crown here could not succeed on the mere application of that rule that the Crown is exempt from toll, the second principle which I have mentioned concludes this case,—that in a matter of this kind the Crown is not to be bound by an Act of Parliament, unless specially named. That rule applies, I think, to the present case where tolls are taken under a local Act. It seems quite clear that even if there were no such general exemption from toll as has been claimed, yet the Crown could not be liable under this Act. The Act does not fall within one of the exceptions mentioned in Bacon's Abridgment as binding the Sovereign. But Mr. Lush relies on the exemptions in this Act, and on the general doctrine, that where certain exemptions are specified in an Act, then the implication arises that cases not expressed are not within the exemptions. But we must take it that the exemptions here were put in *ex abundante cautela*, and for the purpose of pointing out that in certain classes of cases the collectors should abstain from attempting to levy the tolls. In this view I am fortified by the words of Lord Campbell, in *Westover v. Perkins*, a case exactly like the present, except that it arose on a local turnpike instead of a harbour Act. The principle appears to be exactly the same. There were exemptions there almost the same as those here, but Lord Campbell says that "from time immemorial the Sovereign has been exempt from toll ; and when tolls are imposed by statute, there is an implied exemption of the Sovereign's property, either in her own personal use, or in that of her household." Looking, then, at these two rules of law, which have been established by so many authorities, we should be going directly contrary to them if we were to say that this Act encroached upon the prerogative of the Crown, and that in the absence of all express enactment the Crown were liable to these tolls. Other arguments were addressed to us from the particular provisions of the Act, from which the conclusion was drawn on one side that the Crown was intended to be bound, and on the other side that it was not ; but I do not look so much at these particular provisions, as at the general principle established by the highest authorities, that in the absence of any express enactment, the Crown is not liable to tolls.

CROMPTON, BLACKBURN, and MELLOR, JJ., concurred.

Judgment for the respondent.

Q. B. } **REGINA v. THE PARISH OF**
 26 JAN. 1865. } **ASKERTON.**
 5 & 6 Will. 4, c. 50, ss. 94, 95—*Highway—*
Non-repair — Liability Denied — Order by
Justices of Indictment.

Where, on the hearing of a summons, under 5 & 6 Will. 4, c. 50, ss. 94 and 95, respecting the repair of a road, the obligation of the repairs is denied on the part of the parish, on the ground that the road is not a highway, the Justices have no power to order an indictment for the non-repair to be preferred against the parish without hearing evidence, and being satisfied that it is a highway. And, quære, whether they can order an indictment in any case except that of an admitted highway.

An information on oath having been laid before a Justice of the Peace for the division, that a certain highway, in the township of Askerton in Cumberland, was out of repair, and that the township was chargeable, the Justice granted a summons, and the complainant, and the surveyors of the parish, appeared at a Special Sessions before the Justices. On being asked, the surveyor denied the liability of the parish to repair, on the ground that the road in question was not a public highway. The Justices thereupon refused to hear evidence as to its being a public highway, and made an order for a bill of indictment to be preferred against the parish, conceiving that they were compelled to do so by 5 & 6 Will. 4, c. 50, s. 95.

5 & 6 Will. 4, c. 50, s. 94, enacts that if any highway is out of repair, and information thereof on oath is given to any Justice, he shall require the surveyor of the parish, or other person chargeable to appear before the Justices at a special Sessions. Section 95 enacts, "that if on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such Justices, and they are hereby required to direct a bill of indictment to be preferred" at the Assizes or Quarter Sessions against the inhabitants of the parish, or the party to be named in such order for the non-repair, "and the costs of such prosecution shall be directed by the Judge of Assize before whom the indictment is tried, or by the Justices at such Quarter Sessions, to be paid out of the rate made in pursuance of this Act in the parish."

Hayes, Serjt., having last Term obtained a rule *nisi* for a *certiorari* to issue and bring up the above order of the Justices,

M'Leod now showed cause.

The Justices were right, for the statute gives them no option, where the liability of the parish is dis-

puted. The only inquiry they can make is, as to the state of the road,

Ex parte Bartlett, 30 L. J. M. C. 65;

Regina v. Arnould, 8 El. & Bl. 550;

is similar, and is conclusive.

[BLACKBURN, J.—Supposing a private road in a gentleman's park is alleged to be out of repair, must the Justices order the indictment against the parish?]

Yes. I see no escape from going that length.

[COCKBURN, C.J.—Section 95 saddles the parish with the costs; but it would be a great injustice that the parish should pay the costs of such an indictment.]

Yes; but

Regina v. Heanor, 6 Q. B. 745,

decides that, where the road is not really a highway, the Judge has no power to direct the costs to be paid out of the highway rate; and Campbell, C.J., thus answered the same objection, in

Regina v. Arnould, 27 L. J. M. C. 93.

"Highway," in sections 94 and 95, simply means the place where, and is not descriptive of the nature of the road. Besides, the information on oath is *prima facie* evidence of its being a highway; and the order recites, "Whereas a certain highway," &c.

Hayes, Serjt., in support.

The Justices were wrong. Section 95 only applies where it is an admitted highway, and the liability to repair is denied on other grounds. The Justices, at all events, ought to have heard evidence. *Ex parte Bartlett* and *Regina v. Heanor* are in my favour.

COCKBURN, C.J.—The rule must be made absolute. It is not necessary here to decide the question, whether the Justices have authority under this Act to order an indictment to be preferred only where the highway is admitted to be a highway; but it is quite clear that it is not simply because a surveyor denies the liability of the parish to repair, that the Justices can order an indictment. The Justices must, at all events, have before them facts to lead them to the inference that it is a highway, which they had not here, for they refused to enter into the question at all. Whatever may be the true construction of the statute as to the meaning of the word "*highway*" (whether it is only in the case of an admitted highway that the order can be made or not), here the Justices stopped far short of what they ought to have satisfied themselves about.

BLACKBURN, J.—I also think that the Justices were not justified in ordering the indictment. I think both sections 94 and 95 are based on this, that the road is a highway out of repair. *Regina v. Heanor* shows quite clearly that it is only where the road is really a highway that the order should be made. When the road is admitted to be a highway, then it is quite clear that the order is to be made. Where it is alleged on one side and denied on the other, that the road is a

highway, then, if the Justices were held bound to make the order in every case, we can easily imagine a *reductio ad absurdum*—as, for instance, where the road is in a gentleman's private park. In a case where, it being alleged on one side to be a highway, and denied on the other, the Justices hear evidence and come to the conclusion that it is not a highway, then it is clear that they should not order an indictment; but if after hearing evidence they come to the conclusion that it is a highway, then, whether they ought to order an indictment in such a case is a doubtful question, which we need not decide here. All that we now decide is, that in this case the Justices were wrong.

MELLOR, J., concurred.

Rule absolute.

Q. B. } — v. PARR.
26 JAN. 1865. }

*Common Law Procedure Act, 1854, s. 51—
Interrogatories by Plaintiff—Definite cause of
Action—Fishing Application—Interrogatories
before Declaration.*

The Court refused the plaintiffs a rule nisi, to administer interrogatories to the defendant after writ and appearance, but before declaration, where the plaintiffs' affidavits disclosed facts from which the plaintiffs believed they had a good cause of action, but could not without interrogatories decide in what form to draw the declaration.

Quere, per COCKBURN, C.J., whether, under the Common Law Procedure Act, 1854, s. 51, interrogatories can be delivered before declaration.

Watkin Williams, for the plaintiffs, moved for a rule nisi, calling on the defendant to show cause why interrogatories should not be administered to her by the plaintiffs after writ and appearance but before declaration, upon affidavits that the plaintiffs were a firm of attorneys; that certain private and important papers were invariably kept carefully guarded at their office, under the care of themselves or one confidential clerk, and were never seen by any one else; that one day the defendant came to their office and showed them copies of several of these papers; and that on inquiry she said she had obtained the information by clairvoyance and spiritualism; that the plaintiffs then found one of the original papers was missing; and that the papers, having never been shown to her or to any one, and having never been out of the plaintiffs' own custody, the defendant must either have committed a trespass when the room containing the papers was accidentally left unguarded, or have tampered with their clerks; that they believed they had a good cause of action against her, but without interrogatories could not frame the declaration.

By the Common Law Procedure Act, 1854, s. 51,

"In all causes in any of the Superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the Court or a Judge may, at any other time, deliver to the opposite party or his attorney," interrogatories in writing, &c.

Williams.—The words "at any other time" mean before declaration. Here the plaintiffs cannot declare without interrogatories, for they do not know whether the action must be in trespass, or trover, or on the case for tampering with their clerks.

[COCKBURN, C. J.—I am always for giving the largest possible scope to this enactment after a party has entitled himself to claim the benefit, by declaring if a plaintiff, or by pleading if a defendant, but I doubt whether, under this statute, interrogatories can be delivered before declaration, unless you have authority for it.]

[BLACKBURN, J.—This is merely a fishing application.]

COCKBURN, C. J.—We shall not grant a rule. The statute evidently points to the time of delivering the declaration as the time after which interrogatories may be delivered. Now in this case, not only is no declaration delivered, but Mr. Williams says he does not know how to declare—in other words, he does not know whether he has a cause of action or not. I doubt if it ever was the intention of the Legislature to allow interrogatories where, as in this case, the object of the party seeking to administer them is not to establish a particular cause of action, but to find out what cause of action the party has. In the exercise of our discretion, I think we ought not to allow interrogatories before declaration where, as here, the plaintiffs have other modes of attaining their object; namely, by declaring, then administering interrogatories, and then, if the answers show that the declaration is wrongly framed, by amending the declaration; or, secondly, by at first putting more than one count into the declaration, so as to include the grievance under one of them, and then abandoning the unnecessary counts. I do not think we should be justified in setting a precedent which might easily be abused.

CROMPTON, J.—I am of the same opinion. The general rule always used to be, that interrogatories should not be delivered till after issue joined. My Brother Wightman, I know, generally acted on that rule if possible, and at all events did not allow them till after plea. This is a mere question for our discretion, and I cannot see that there is any hardship on the plaintiffs, for they can declare in different ways.

BLACKBURN, J.—I also think we cannot interfere here. Mr. Williams' object in asking for interrogatories is not merely that he may save time, but because he does not really know what his cause of action is.

I cannot see what cause of action there can be in this case that would not be embraced by trover. The very essence of our jurisdiction in this matter is, that we should see what the nature of the action is before we grant interrogatories. It will not do merely to show that the plaintiff has a cause of action. Interrogatories are generally granted as ancillary to and in aid of the plaintiff's case after he has shown the nature of it, and they are certainly never to be allowed in support of a case where the party himself cannot tell what his cause of action is.

MELLOR, J.—I concur. The plaintiffs ought to come with a definite affidavit of the ground of their action, which they have not here.

Rule refused.

Note.—See as to allowing interrogatories before declaration,

Crewes v. Morrison, 26 L. T. 233,
Campbell, C. J., and

James v. Barnes, 25 L. J. C. P. 183; and 17
C. B. 598,
per Jervis, C. J.

Q. B. } REGINA v. CORONER OF DOVER.
31 JAN. 1865. }

Coroner—Inquisition—Adjournment—Coram non judice.

All the evidence having been taken on a coroner's inquest, and the jury having on the 5th of August delivered a written verdict, the coroner then adjourned the case to the 8th of August, that the inquisition might be carefully drawn up for the jury to sign on that day. Before the 8th of August the coroner gave notice to the jury not to attend on that day, and neither he nor the jury attended on that day. The coroner afterwards issued his precept summoning the jury for the 12th of August, on which day he and they attended, and the inquisition was signed:—

Held, that the Court not having been held on the 8th of August, the proceedings on the 12th were coram non judice, and that the inquisition must be quashed.

The facts are also reported in 5 N. R. 198.

The inquisition having been brought up by *certiorari*,

Parry, Serjt., and Francis, showed cause against a rule to quash it.

The meeting on the 12th of August was good, for the jurors merely met to sign the inquisition, having already delivered a written verdict. The signing was a mere ministerial act.

[COCKBURN, C. J.—No; for when they came to read the inquisition and saw how it was drawn up, they might say the legal effect was not what they intended, and might refuse to sign it.]

2 B. Just. 37, "Coroner," s. 7 (ed. 1845);

Regina v. West Torrington, Burt. S. C. 293;

Garnett v. Ferrand, 6 B. & C. 611.

[BLACKBURN, J.—That case does not apply.]

The notice not to meet on the 8th, and the precept which the coroner issued summoning the jury for the 12th, were equivalent to a formal adjournment.

[COCKBURN, C. J.—The Court being dissolved, the precept to summon the jury on the 12th was worthless, and the jurors need not have obeyed it. When once they were allowed to disperse, they were no longer seised of the case.]

Henry James, in support, was not called upon.

PER CURIAM, (Cockburn, C. J., Blackburn and Mellor, JJ.)—

Rule absolute without costs.

C. P. } FESSARD v. MUGNIEB.
23 JAN. 1865. }

Composition Deed—No Payment or Tender of Composition—Creditor Resident out of England—Whether Debtor bound to seek him.

A plea setting up a composition deed not executed by the plaintiff, but complying with all the requisitions of sections 185—187 of the Bankruptcy Act of 1861, by which the defendant covenanted to pay his creditors a composition on a given day, and in consideration of the said covenant, the creditors released the defendant (in default of payment, the deed to be void), alleging that the defendant has always been, and still is ready and willing to pay to the plaintiff the said composition, and that all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became, and was and is bound by the said deed as if he had executed the same:—

Held bad, for not alleging payment or tender of the composition.

Where A in England contracts with B, who at the time of the contract to A's knowledge, resides and carries on business in Paris, to pay B a sum of money on a given day, B need not come into England to enforce payment, but A must find out B, and pay him.

Declaration.—That the plaintiff on the 1st day of August, 1862, by his foreign bill of exchange, made at Paris, in the empire of France, now overdue, directed to the defendant, required the defendant to pay to the plaintiff 27l. 10s., three months after date, and the defendant accepted the said bill, but did not pay the same.

Second count, for goods sold and delivered, for interest and on accounts stated.

Plaintiff's claim 35l.

2nd plea.—That after the accrual of the plaintiff's claim in the declaration mentioned, and before this action, he the defendant became and was adjudicated to be bankrupt within the meaning of the statutes

in force concerning bankrupts, and that at the first meeting of creditors duly held after such adjudication, three-fourths in number and value of such creditors present and represented at such meeting, duly resolved that a proposal of the defendant then and there made to pay a composition of 5s. in the pound on the 8th day of May, 1863, in discharge of his creditors' claims, should be accepted; and that the estate of the said defendant should be wound up under a deed of composition in the terms of the said proposal, and that an application should be made by the defendant to the Court to stay the proceedings in the said bankruptcy, until the said 8th day of the said last-mentioned month of May, at 11 o'clock in the forenoon precisely. And the Registrar of the said Court of Bankruptcy did duly report such resolution to the said Court, and such Court did afterwards, on the 11th day of April in the year last aforesaid, after finding that the said resolution had been duly carried, and that its terms were reasonable and calculated to benefit the general body of the creditors under the said estate, confirm the said resolution, and made order accordingly; and also that all further proceedings in the defendant's said bankruptcy should be, and the same were thereby stayed and suspended for one month from the said last-mentioned day. And the defendant says, that he the defendant afterwards duly produced to the said Court for its consideration, a deed of composition, signed by and on behalf of three-fourths in number and value of all his said creditors.

The plea then sets forth the deed made the 2nd of April, 1863, between the defendant of the one part, and the persons whose names and seals were thereunder subscribed and set, and all other persons creditors at the date thereof of the bankrupt, of the other part; by which, in consideration of the release thereafter contained, the defendant covenanted with the parties of the second part, that he would, on or before the 8th of May then next, pay unto each and every of the said parties of the second part, a composition of 5s. in the pound on the amount, and in full discharge of their respective debts and claims, and in consideration of the said covenant the said several creditors, parties of the second part, did each of them release the defendant from all actions, suits, claims, and demands whatsoever, which the said parties of the second part, or either of them then had against the defendant. The deed contained a proviso that it should not affect any mortgages, charges, or other securities or liens, which any of the parties of the second part might have upon the estate of the defendant, or any bonds, bills, notes, or other securities given or payable by any other person by way of security, for any debt due from the defendant to either of the said parties of the second part—and another proviso, that if the defendant should make default in payment of the said composition on the said 8th day of May, and such composition should remain unpaid for fourteen days after that day, the release should be void. The deed

was executed by the defendant, and the names and seals of twenty-four creditors annexed.

And the defendant further says, that the said Court of Bankruptcy (after the proper preliminaries) did order and declare that such deed had been completely executed, and also directed that the same be, and it was thereupon registered with the Chief Registrar of the said Court of Bankruptcy; and... all the matters aforesaid happened before this suit, and at the time of the happening thereof the plaintiff was a creditor of the defendant in respect of the sums of money and causes of action herein pleaded to within the meaning of "the Bankruptcy Act, 1861." And also that the defendant has always been and still is ready and willing to pay to the plaintiff the said composition or sum of 5s. in the pound on the amount of the said sum herein pleaded to according to the provisions of the said deed of composition. And also that all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed of composition, as if he had been a party thereto and had duly executed the same.

Demurrer to the 2nd plea, on the ground that the plea shows no payment on the tender of the composition to the plaintiff at or before the time appointed. Joinder in demurrer.

2nd replication to the 2nd plea, that the defendant made default in the payment of the said composition on the said 8th day of May, 1863, and the said composition remained unpaid to the plaintiff for more than fourteen days next after that day, and the said composition still remains unpaid to the plaintiff, and that the same never has been paid or tendered to the plaintiff.

3rd rejoinder to the 2nd replication.—That the plaintiff was not on and during the said 8th day of May, in such replication mentioned, and for the space of fourteen days next after that day, within the realm of England, but was out of the realm of England.

2nd surrejoinder to the 3rd rejoinder.—That the plaintiff was a native of the empire of France, and long before the accruing of the said debts in the declaration mentioned, was and has always thence hitherto been resident and carried on his business at Paris in the said empire, and not in England, and that the plaintiff was not in England at the time of the contracting or accruing of the said causes of action, and that the said bill of exchange in the said declaration mentioned was drawn by the plaintiff at Paris aforesaid, and was given by the defendant, and the said accounts were stated for and in respect of the price of certain goods which were supplied by the plaintiff to the defendant, and the said goods mentioned as sold and delivered in the second count were also supplied and sent by the plaintiff from his said place of business at Paris to the defendant, and that the plaintiff was not in England at the time of the making of the said

deed by the defendant, of all which premises the defendant had notice at the time of the executing of the said deed by him, and that the plaintiff had not notice of the making thereof, or at the time of the making, or on the said 8th day of May, 1863, or within fourteen days after that day.

Demurrer to the 2nd surrejoinder, on the grounds, 1st, that notwithstanding the allegations of fact in the said surrejoinder alleged, yet the defendant was not bound in law to seek out the plaintiff in Paris or elsewhere out of England, to pay or tender to him the composition; 2nd, that such surrejoinder does not allege that a reasonable time elapsed between the time of payment in the composition-deed mentioned and the commencement of this suit, within which the defendant could seek out the plaintiff in Paris or elsewhere out of England, and pay to him the said composition; 3rd, that it is consistent with the said surrejoinder that the said composition was not paid by the defendant to, or received by, the plaintiff, through his own default.

Joinder in demurrer.

Dowdeswell, for the plaintiffs, in support of the demurrer to the 2nd plea, and of the 2nd surrejoinder to the 3rd rejoinder to the 2nd replication to the same plea.

1st. The deed operated as a covenant not to sue, and if so, cannot be pleaded in this form. It might possibly be pleaded as an equitable plea, but even then would have to aver compliance with the condition. The release is not absolute, for there is a proviso for certain securities to be still available,

Solly and Another v. Forbes and Another,
2 B. & B. 38;

Willes and Others v. De Castro, 27 L. J. C. P.
243;

Price v. Barker, 24 L. J. Q. B. 130; 4 El. & Bl.
760.

[WILLES, J.—Is it mentioned on the record that there were any such securities existing?]

No. But that is a matter within the knowledge of the defendant, and not within ours.

2nd. Payment of the composition being the act which was to discharge the defendant, the plea is bad, for not averring such payment or tender,

Cumber v. Wane (note), 1 Sm. L. C. 295, and cases there cited.

Readiness and willingness is not sufficient,

Hazard v. Mare, 6 H. & N. 434; 30 L. J. Ex.
97.

[WILLIAMS, J., referred to some remarks of Turner, L.J., in

Squire v. Ford, 9 Hare, 47.]

3rd. When A, in England, contracts with B, residing in France, to pay B a sum of money on a given day, B need not come into England to enforce payment, but A must find out B, and pay him.

This question arises in

Co. Lit. § 340;

Shep. Touch. 378 (8th ed.);

which are relied on by the defendant.

But in the case there put, the person to be paid is himself the cause of his not being paid. *Aliter*, where the person to be paid is known at the time of the contract to be residing abroad.

Tapping, for the defendant, in support of the plea and of the demurrer to the second surrejoinder.

The deed is a good bar,

Keyes v. Elkins, 5 N. R. 218 (Q. B.).

The general averment of performance of conditions precedent is sufficient,

Common Law Procedure Act, 1852, § 57;

Bentley v. Daves, 9 Exch. 666.

The defendant was not bound to seek the plaintiff out of England,

Co. Lit. § 340;

Shep. Touch. 278 (8th ed.);

Cranley v. Hillary, 2 M. & Sel. 120; *per* Dam-
prier, J., at p. 122;

Haldane v. Johnson, 8 Exch. 689; *per* Martin, B.,
at p. 695;

Rothschild v. Currie, 1 Q. B. 43;

Dowdeswell, in reply, cited,

London Dock Company v. Sinnott, 8 El. & Bl.
347; 27 L. J. Q. B. 129.

ERLE, C.J.—I think our judgment should be for the plaintiff. It is not necessary for us to decide the question, whether this plea has been pleaded rightly as a release, or, whether it should have been pleaded as a covenant not to sue. The plea is bad for not showing any payment or tender of the composition. The deed was to be void, unless the composition should be paid on a certain day. All that is averred in the plea is, that the defendant was ready and willing to pay it, and that is not enough. The general averment of performance of conditions precedent only relates to the plaintiff's being bound by the deed though not an executing creditor,—and not at all to any subsequent matter such as payment of the composition. Then, as to the excuse that the plaintiff was abroad, and so that the defendant was not bound to seek him out and pay him, there is a distinction sustained by all the authorities, which is this: if the contract had been made, and the plaintiff had afterwards gone abroad, it would not have been necessary for the defendant to follow him. But it appears from the surrejoinder that it was a French contract, and that the plaintiff was living abroad before and at the time of the making of the contract, and of the accruing of the causes of action. This being so, the plaintiff's absence abroad was no excuse. The plea is, therefore, bad, and the surrejoinder good.

WILLIAMS, WILLES, and KRATING, JJ., concurred.
Judgment for the plaintiff on both demurrers.

C. P. } NIELL and Others v. WHITWORTH
24, 26 JAN. 1865. } and Others.

Non-delivery of Goods—Delivery at a particular Place—Condition precedent to Liability to Accept—Stipulation in favour of Vendor.

On a sale of cotton the bought note expressed that the plaintiffs bought of the defendants 500 bales, to arrive per ship or ships (to be declared): "the cotton to be taken from the quay; customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale." The ships were declared and arrived, and the cotton was landed on the quay, and afterwards warehoused by the dock authorities, under a power authorising them to warehouse goods at the owner's expense, if left more than twenty-four hours on the quay. The plaintiffs applied for delivery of the cotton while it was on the quay; the defendants refused, but offered delivery from the warehouse: but the plaintiffs refused to accept from the warehouse. In an action by them for non-delivery of the cotton:—

Held, that the words, "the cotton is to be taken from the quay," did not constitute delivery at the quay a condition precedent to the vendee's liability to accept, but that they were a stipulation in favour of the vendor to enable him to avoid warehouse charges, and that they did not limit the time for delivery.

Declaration for non-delivery of 500 bales of cotton, claiming damages for the plaintiffs' loss of profits, and for their being prevented from fulfilling a contract they had entered into for a resale of the cotton.

Pleas.—1. Traverse of sale on the terms alleged. 2. Traverse of breach. 3. That the plaintiffs were not ready and willing to accept. Issue thereon.

The cause came on for trial before Pigott, B., at Liverpool; but the facts were taken by consent on the Judge's notes, and a verdict entered for the plaintiffs.

The plaintiffs were cotton merchants in London, and on the 2nd of October, 1863, they, through their brokers, Messrs. Truman & Rouse, entered into a contract for the purchase of cotton from the defendants, who were cotton merchants at Manchester. The contract was in the usual form of Liverpool cotton contracts, the following being the bought note:—

"Bought for account of Messrs. Niell, brothers, of B. Whitworth & Brothers, Manchester, 500 bales cotton, at 15½d. per lb., guaranteed October shipment, to arrive from Calcutta to Liverpool, per ship or ships.

"The cotton guaranteed fair Bengal, any slight variation in mark not to vitiate this contract. In case of dispute, the matter to be referred to two respectable brokers, who shall decide as to quality and the allowance to be made.

"The cotton is to be taken from the quay: customary allowances of tare and draft, and the invoice to be dated from date of delivery of last bale.

"To be in merchantable condition: the damaged (if any) to be rejected, provided it cannot be made merchantable. Should cotton be transhipped into other vessels arriving, the contract to hold good; but if any of the vessels be lost, the contract to be void, so far as regards such ship only.

"Payment, cash within ten days, made equal to ten days and three months. Cash on account before delivery, if required."

On the 8th of January, 1864, the ships in which the cotton was to arrive were declared, according to the custom at Liverpool in contracts like the present; and Truman & Rouse gave the plaintiffs a memorandum that "Sellers had declared the following cotton—250 bales per 'Talavera'; 250 bales per 'Fort George.'" "The Talavera" arrived at Liverpool on the 3rd of February, 1864, with a cargo of cotton, and finished unloading at the quay on the 13th. The dock authorities at Liverpool have power, if goods are left on the quay more than twenty-four hours, to warehouse them at the expense of the owner, or to inflict a fine upon him. While the cotton in question was still upon the quay, the defendants were applied to for a delivery order for 250 bales, under their contract with the plaintiffs, but refused to give it. After the lapse of the twenty-four hours the dock authorities removed the cotton from the quay to warehouses close by it, and then the defendants offered to deliver to the plaintiffs 250 bales at the contract price: but the plaintiffs refused to accept them, on the ground that they were not offered ex quay, and on no other ground. "The Fort George" was stranded in Caernarvon Bay, and her cargo of cotton was taken out and forwarded to Liverpool by railway; on its arrival there it was put in the wreck transit-sheds, which (as appeared on the Judge's notes) were considered a part of the quay, and was afterwards warehoused under the same circumstances as the cargo of "The Talavera." The defendants offered to deliver the cotton ex warehouse, at quay weights and at contract price, and also to cart it back to the quay and deliver it there; but both offers were refused by the plaintiffs. This action was brought to recover the difference between the contract price at which the plaintiffs bought the cotton, namely, 15½d. a pound, and the price at which they resold it on the 28th of October, 1863, namely, 18½d. a pound; and a verdict was entered for them for such difference.

Last term, Brett, Q.C., obtained a rule to set aside this verdict and enter it for the defendants, pursuant to leave reserved, on the ground that the stipulation that the cotton was to be taken from the quay was in favour of the vendor and not of the purchaser, or if not that it was a stipulation only, and not a condition in the contract.

Edward James, Q.C., Mellish, Q.C., and Baylis, now showed cause.

The cotton should have been delivered to us from

the quay, and by allowing it to be warehoused the defendants put it out of their power to fulfil their contract with us. They had no right to extend the time and deliver under another contract. That the cotton should be ex-quay is a condition precedent to the defendants' right to call on us to accept; it is not a mere stipulation, nor in favour of the vendor, for, if so, nothing would have been easier than to have said that the cotton should be taken from the quay by the vendee "if required."

Brett, Q. C., and Holker, in support of the rule.

The defendants gave the plaintiffs a delivery order before action brought: and to recover in this action the plaintiffs must show that delivery ex quay is a condition precedent to their liability to accept; but the provision in question is not such condition precedent, if it is a stipulation in favour of the vendor: nor is it, if it is a stipulation in favour of the vendee, unless it goes to the whole consideration.

It is a contract to deliver in a reasonable time, and not in twenty-four hours: for the plaintiffs might deliver the last bales in the ship; and instead of warehousing after the twenty-four hours, the dock authorities might fide the owner of goods left on the quay; and the clause in the contract that the damaged cotton, if any, is to be rejected, "provided it cannot be made merchantable," clearly contemplates the vendor or importer keeping it more than twenty-four hours on the quay. If the cotton was damaged by the sea, he would have to dry it; if it was dirty, to pick it: and it might well be requisite for him to warehouse it. The stipulation, therefore, is in favour of the importer, and to relieve him from the liability to pay warehouse rent, and throw it on the consignee. The cotton is to be "taken from" the quay, that is taken by the vendee.

A cross-action for damages will lie for the breach of an agreement in a contract which is an independent agreement, and not a condition precedent.

Behn v. Burness, 2 N. R. 184; 32 L. J. Q. B. 204; 3 B. & S. 751;

Ritchie v. Atkinson, 10 East, 295;

Tarrabochia v. Hickie, 1 H. & N. 183;

Jonassohn v. Young, 2 N. R. 390; 32 L. J. Q. B. 385.

ERLE, C.J.—I am of opinion that this rule should be made absolute. In an action for non-delivery of goods, the defendants say, they were ready and willing to deliver. But the plaintiffs object that there was a condition precedent not performed by the vendors, and that therefore the contract is broken, and this action brought. The question is, are these words, "The cotton is to be taken from the quay," a condition precedent to the vendees being bound to accept. Were the defendants bound to offer the cotton on the quay? I have no doubt the law is made clearer to me on this difficult question by the judgment of my Brother Williams in *Behn v. Burness*; and the distinctions

which decide this question are there pointed out. This, I think, is an independent stipulation for the benefit of the vendor, and the vendee cannot insist on its performance for his sake. I first look at the nature of the contract, and then at its terms. After the more operative words come, I think, provisions in favour of the vendor, that the cotton shall be taken from the quay, and that the customary allowances shall be made for tare and draft. It is of no importance to the vendee whether he gets the cotton from the one place or the other, provided he is not put to expense thereby, and no delay is occasioned. The provision is for the purpose of saving the vendor expense. I am also clearly of opinion, on considering the contract, that this was not meant as a stipulation with regard to time, because there is nothing to show which 500 bales out of the ship the defendants are to deliver; and it would be a performance of this contract if they delivered the very last 500 bales. There is nothing to show that this should be construed as a stipulation for time, or for the benefit of the vendee; but I do see good reason for saying that it is in favour of the vendor, and to avoid warehouse rent.

WILLIAMS, J., concurred.

WILLES, J.—I am of the same opinion. It at first struck me that, "to be taken from the quay," must be taken literally, as a stipulation on the one hand, with a corresponding promise on the other, that the vendor should offer, and the vendee take, the goods from the quay; and that if the vendor did not do so he broke his contract; and if the vendee would not take from the quay, he broke his. But after the argument on both sides, I am satisfied that this literal interpretation of the words would be entirely incorrect. The words in question do not affect the quality or identity of the goods sold, as they would if they had been "to be taken from New Orleans or Wilmington"; and there is no stipulation as to the time within which the contract is to be performed; for how would the contract stand if these words were left out? It would be a contract for delivery and acceptance in a reasonable time. A use can be found for these words, "to be taken from the quay," if they are construed in favour of the vendor; and the other provisions of the clause as to tare and draft are imposed on the vendee for the benefit of the seller; and the invoice is to be dated from the delivery of the last bale. Therefore I cannot help thinking the contract stands for delivery and acceptance within a reasonable time, and under reasonable circumstances; the buyer to be at the charge of the goods after they are put on the quay, and the vendor not to put extra charges on the vendee by reason of not delivering them there. Here the seller offered to take the goods back to the quay, and fulfil the condition of the contract, without any injury to the vendee; so that if delivery from the quay constitutes a condition precedent, there would follow this *argumentum ex absurdo*, that this offer would not do,

and the vendee might refuse to accept, because the vendor was bound to offer from the quay in the first instance. In making the stipulation, locality, I think, was not before the minds of the parties.

KEATING, J.—I am of the same opinion. The provision was solely for the benefit of the vendor, and amounts to this, you shall take delivery from the quay if I am there and offer it; and the object of that probably was, as Mr. Brett said, to get rid of warehouse charges. That is, I think, a reasonable and sensible construction to put on the contract.

Rule absolute.

C. P. } ELLWOOD and Another v. CHRISTY
27 JAN. 1865. } and Others.

Infringement of Patent—Order for Account of Profits—How Profits to be Assessed—Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42.

In an action for the infringement of a patent, the Court will not refuse to make an order under the 15 & 16 Vict. c. 83, s. 42, for the master to take an account of all profits made by the defendants by reason of their infringement of the plaintiff's patent, on an ex parte statement on affidavit by the defendants, showing what profits they have made, and on their readiness to submit to an order to pay the same, though in making the order the Court may impose terms. Such inquiry before the master must be confined to the profits actually made by the defendants, without reference to the loss incurred by the plaintiffs.

Action for infringement of a patent granted the 27th of November, 1851, and assigned to the plaintiffs by indenture of February 5th, 1863, duly registered according to the "Patent Law Amendment Act, 1852." Claim 5000*l.*, and a writ of injunction, and for an account to be taken of all profits which had been, or which, during the pendency of this suit, might be made by the defendants by the infringement of the said patent, and that the defendants might be ordered to pay the same to the plaintiffs.

Usual pleas of denial.

Particulars of breaches showing the breaches to be the sale by the defendants between the 5th of February, 1863, and the commencement of the suit (17th April, 1863), of hats and helmets constructed according to the patent.

The assignment was registered under the statute on the 14th of April, 1863.

Action tried before Erle, C.J., and a special jury at the sittings after last Trinity Term for Middlesex.

Verdict for the plaintiffs on all the issues.

By an order in the cause, made on the plaintiffs' application, by Erle, C.J., dated the 7th of July, 1864, the verdict was entered for the plaintiffs on all the issues, with 40*s.* damages, subject to points reserved;

an account to be kept from the date of the verdict, without prejudice to the plaintiffs making an application for any other account to which the Court might think the plaintiffs entitled.

On the 15th of November, 1864, a rule obtained by the defendants for a new trial, on the ground that the verdict was against evidence, was discharged.

On the 25th of November, 1864, *T. Aston*, for the plaintiffs, moved for an account of all hats or helmets, or parts of hats or helmets, made or sold by the defendants pending the action, and for the delivery to the plaintiffs of such as remained in the defendants' possession and unsold, and for payment of all profits of which the plaintiffs had been deprived by means of the infringement of the plaintiffs' patent, and for an injunction restraining the defendants from the continuance of their infringements, and for an inspection of the defendants' books, &c.

The affidavit of one of the plaintiffs in support of this motion, stated that he had been informed and believed that the defendants had, pending the action, made and sold, or had ready for sale or exportation abroad, very many hats or helmets, or parts of hats or helmets, intended or adapted to be made into hats or helmets similar to the hats or helmets proved at the trial to have been made in infringement of the plaintiffs' patent, &c. &c.

The Court granted the rule *nisi* under the "Patent Law Amendment Act, 1852," 15 & 16 Vict. c. 83, s. 42, to the extent sanctioned by the Court of Queen's Bench in *Holland v. Fox* (3 El. & Bl. 936), and the rule was drawn up in the following form:—

"To show cause why one of the Masters of this Court should not take an account of all profits made by the defendants by means of the infringement of the plaintiffs' patent, and why the defendants should not pay to the plaintiffs the amount of such profits, and why a writ of injunction should not issue to restrain the defendants from continuing to infringe the plaintiffs' patent."

Against this rule *Murray (Bovill, Q.C., with him)*, now showed cause.

He produced an affidavit made by all five defendants, showing an account of all the hats and helmets sold by them from the 5th of February, 1863 (the date of the assignment of the patent to the plaintiffs), up to the present time, and the nett profit made on every hat and helmet, and also stating that the defendants had no hats or helmets now in stock, and contended that there was no necessity for an account being taken before the Master, as it would be sufficient to make an order for the defendants to pay the sums shown on their affidavits to be the profits made.

Secondly, the assignment to the plaintiffs was made on the 5th of February, 1863, but not registered under 15 & 16 Vict. c. 83, s. 35, till the 14th of April, 1863. Till such registration the plaintiffs

had no title, so the profits can only be reckoned from the 14th of April, 1863.

This point was not argued on the other side.

Hindmarch, Q.C., and *T. Aston*, for the plaintiffs, in support of the rule, cited,

Wallon v. Lavater, 8 C. B. (N. S.) 162.

It is not only the profits of the defendants, but the loss of the plaintiffs, that is to be considered in assessing the damages. The object of the statute, 15 & 16 Vict. c. 83, s. 42, was to place a Court of Common Law on the same footing as the Court of Chancery: and the Court of Chancery decides what loss the plaintiff has sustained.

In the late case of *Betts v. Menzies*, the Court gave the plaintiff liberty to assess the damages, on this principle.

Again, the defendants' affidavit says nothing about parts of hats ready for exportation, which we mentioned in our affidavit.

The affidavit is only an *ex parte* account, and it is always usual to go before the Master, and have both sides heard.

The smallness of the defendants' profits, is no criterion of the injury to the plaintiffs.

[WILLES, J., referred to

Vidi v. Smith, 3 El. & Bl. 969.]

ERLE, C.J.—I think substantial justice would be done, if this rule were discharged. But I pause and scruple to do this, as we should then be adopting a one-sided account. Unless, therefore, the parties choose to let the rule drop, it must be made absolute, on the terms, that it be referred to the Master, to ascertain what profits the defendants have actually made by their infringement of the plaintiffs' patent, since the date of the registration of the assignment: the plaintiffs having no right to anything but the profits actually made by the defendants. If, on the hearing, the plaintiffs should not succeed in surcharging the amount stated in the defendants' affidavit as the amount of profits made by one-sixth, the plaintiffs are to pay the costs of the rule, and of the inquiry.

WILLIAMS, J.—I agree. There is nothing in *Wallon v. Lavater* to sanction the principle of assessing the profits contended for by Mr. Hindmarch.

WILLES, J.—On account of the objection to our adopting a one-sided account, I agree that this rule must be made absolute. But only the profits actually made by the defendants are to be assessed. For loss in their own profits, the plaintiffs might go before a jury for damages, but not before the Master.

KEATING, J., concurred.

Rule absolute, on the terms contained in Erle, C.J.'s, judgment.

C. P. } SKILTON v. SIMMONS.
27 JAN. 1865. }

Process—Composition Deed—Protection in Bankruptcy—24 & 25 Vict. c. 134, s. 198—
“Leave of the Court”—Jurisdiction.

Where a defendant has executed and registered a deed of composition, originally good under section 192 of “The Bankruptcy Act, 1861,” and has obtained protection in bankruptcy under section 198, but has since failed to pay the instalments which he covenanted to pay by the deed, such covenant being the consideration for the release therein, the Superior Courts at Westminster have no jurisdiction to allow him to be arrested on a ca. sa. “The Court,” in section 198, means “the Court of Bankruptcy,” not “the Court out of which the process issued.”

In this case, *J. O. Griffiths* had obtained a rule to show cause why the plaintiff should not be at liberty to arrest the defendant on a *ca. sa.* issued by him out of this Court, notwithstanding a deed of composition duly executed and registered by the defendant under the Bankruptcy Act of 1861, and a certificate duly obtained by him as a protection in bankruptcy under section 198.

It was admitted that the deed was originally perfectly binding under section 192, but the rule was obtained upon affidavits, showing that the defendant having covenanted, by the said deed, to pay certain instalments, and the release in the deed being in consideration of such payment, such instalments had not been paid.

Section 198 of the Act of 1861, upon which the question turned, is in the following words:—“After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, other than such process, by writ or warrant, as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, *without leave of the Court*; and a certificate of the filing and registration of such deed under the hand of the Chief Registrar and the seal of the Court, shall be available to the debtor for all purposes as a protection in bankruptcy.

Kenealy now showed cause.

The deed was good *ab initio*, and no fraud is shown to invalidate it. The matter is within the cognisance of the Court of Bankruptcy, and this Court has no jurisdiction. “Leave of the Court,” in section 198, means “leave of the Bankruptcy Court.” See the interpretation clauses in section 229. By section 188, “The Court shall determine all questions arising under the deed according to the law and practice in bankruptcy.” By section 226, the Court of Bankruptcy may, in cases of wilful disobedience to any order of

the Court, commit the offender to prison, and so revoke their protection. He cited,

Walter v. Adcock and Another, 31 L. J. Exch. 380; *per* Martin, B.;

Ex parte Godden, in *Re Shettle*, 32 L. J. Bky. 37, *per* L. J. Knight Bruce;

Ex parte Morrison. *Re Clunn*, 33 L. J. Bky. 47.

This Court will not interfere with the jurisdiction of another Court.

J. O. Griffiths, in support of the rule, contended that "the Court," in section 198, meant "the Court out of which the process issued," and that the Court of Bankruptcy had no jurisdiction to interfere with the process of this Court.

Under the Act registration is granted, irrespectively of the goodness or badness of the deed, on the face of it.

[WILLES, J.—I think not. I think the Registrar does not register a deed bad on the face of it as a matter of law.]

It is admitted that the deed is now inoperative. The Court of Bankruptcy has no power to revoke its protection, but only to see that the property is properly administered.

In a case lately before the Lord Chief Baron at Chambers, his Lordship made the order to arrest, after looking at the cases cited. See also,

Re Harwood, 7 L. T. (N. S.) 171;

where Mr. Commissioner Fonblanque referred to the practice of Lord Eldon.

[WILLES, J.—It is common in a case of privilege for a Court having the privilege to interfere.]

See,

Baerselman v. Langlands, 11 L. T. (N. S.) 348 (Ex.).

The rule is important for the protection of the sheriff.

[ERLE, C. J.—If we have no jurisdiction, the rule will be no protection to the sheriff.]

ERLE, C. J.—I think this rule should be discharged. The statute has enacted that the deed should be registered, and then that the debtor should be protected by the Court of Bankruptcy. "Leave of the Court," in section 198, may well mean "leave of the Court of Bankruptcy." That Court has the right to suspend or take away its protection. As to the objection that the Court of Bankruptcy cannot interfere with the process of this Court, the suitor is not prevented from coming to this Court, but the Court of Bankruptcy alone can take away the objection imposed by statute to this Court's exercising its jurisdiction in this case. I see no sign in this statute of any intention that this Court should interfere. The Bankruptcy Court may modify its proceedings according to circumstances. Here it has to deal with the case of a deed valid *ab initio*, but where the instalments have not been paid. The Bankruptcy Court may, if they think fit, provide for the case, and then the party may issue his writ.

WILLIAMS, J., concurred.

WILLES, J.—I agree. With reference to discharge, I should consider myself bound by authority. The cases are collected in 1 Chitty's Archbold's Pract. 770, 771 (11th ed.). In some cases, as in the case of an officer of one of the Courts, who has been arrested under the process of another Court, there are numerous precedents to show that the first-named Court has the privilege of discharge. But it is quite clear that under these sections only the Court of Bankruptcy can interfere.

KEATING, J., concurred.

Rule discharged.

C. P. } SWIRE v. LEACH.
27 JAN. 1865. }

Pawnbroker's Pledges—Privilege from Distress—Measure of Damages for Conversion.

Goods pledged at a pawnbroker's are privileged from distress, and that though they have been pledged for more than a year.

If the landlord distrains them, he is liable, in trover, to the tenant for their whole value.

Action, tried before Pigott, B., at Liverpool.

Verdict for the plaintiff, damages 30*l*.

Monk, Q. C., had obtained a rule, to show cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendant, or a nonsuit, or why the damages should not be reduced, as the Court should think fit.

The action was in trover for certain goods.

Plea—Not Guilty (by statute).

The plaintiff was a pawnbroker, and tenant of a house, in which he kept goods pawned with him.

The defendant was a bailiff and auctioneer, and landlord of the said house; and he took the goods in question, which were goods pawned with the plaintiff, as a distress for rent.

The defendant contended that he had a right to distrain the goods, though pawned; and the plaintiff maintained that goods pledged at a pawnbroker's are privileged from distress.

The question as to the damages was—1st. Whether the plaintiff was entitled to recover the full value of the goods, or only the amount of his interest in them—viz., the sum which he had advanced upon them? 2nd. Whether such of the goods as had been pledged more than a year, had not become the absolute property of the plaintiff, so as to be free from the alleged exemption from distress?

Saunders and Holker now showed cause.

The right of a landlord to distress, is an exception to the Common Law. The privilege of certain goods from distress is an exception to that exception, made when the interests of the public interfere.

Pawnbrokers' pledges are within the principle of the exception to the exception.

See the principles laid down, and cases cited, in the notes to

Simpson v. Hartopp, 1 Sm. L. C. (5th ed.) 373.

Such things are protected for the benefit of trade,

Adams v. Grane, 1 Cr. & M. 380;

Gibson v. Ireson and Another, 3 Q. B. 39;

Brown v. Shevill, 2 Ad. & E. 138.

This is a public trade,

Wickenden v. Webster and Others, 25 L. J. Q. B. 284,

as to what is a "public business."

Where the goods are notoriously not the goods of the tenant, the landlord may not distrain.

See the judgment of Bayley, J., in

Adams v. Grane, citing, Black. Com.

See also,

Joule v. Jackson, 7 M. & W. 450;

2 Wms. Saund. 290 a. b.

As to the damages, the plaintiff can recover the whole value of the goods as against a wrong-doer. Forfeited pledges may, even after the year, be recovered by the pledgor; so the property does not pass to the pawnbroker. See

Pawnbroker's Act, 40 Geo. 3, c. 99, s. 17.

Monk, Q.C., for the defendant, in support of the rule.

The principle is not, that certain goods are protected for the benefit of trade. The protection is in the case of "things delivered to a public trader to be carried, wrought, worked up or managed in the way of his trade or employ."

Pawnbrokers' pledges are within neither of those heads. In the case of pawning, the essence of the contract is the loan of money.

In strictness, a pawnbroker is not a trader, and was not formerly within the bankrupt laws. He gets money not by buying and selling, but by lending money at interest.

None of the cases cited apply to this case. The Court will not extend the principle of exemption,

Muspratt v. Gregory, 1 M. & W. 633; s. c. in

Error, 3 M. & W. 678.

[ERLE, C.J.—How does a wharfinger differ from a pawnbroker?]

In the care which he has to take in receiving, stowing and forwarding the goods. See

Joule v. Jackson, cited on the other side.

Notoriety, as to the goods not belonging to the tenant, is not the principle of exemption,

Parsons v. Gingell, 4 C. B. 545.

As to damages, they should be confined to the plaintiff's interest,

Johnson v. Stear, 3 N. R. 425; 33 L. J. C. P. 130.

As to goods pawned for more than a year, the pawnbroker can sell them, and so they are his property so as to be distrainable.

ERLE, C.J.—I think this rule should be discharged. The action is by a pawnbroker against the landlord of the premises for trover of goods pledged with him as pawnbroker. The governing point is, whether goods pledged with a pawnbroker are exempt from a distress by the landlord. Certain goods are exempt, and many Judges have attempted to lay down a definite principle, outside which there should be no exemption. But no definite principle has been laid down, and it must be gathered from many specific instances. I think pawnbrokers' pledges fall within the meaning of "things delivered to a person exercising a public trade, to be dealt with in the way of his trade," in respect of which trade he has a right to hold the goods. I see no distinction between an auctioneer, wharfinger, &c., and a pawnbroker. What many of them have to do is to keep the goods, and make a profit on keeping them. A pawnbroker is bound to exercise a certain degree of care in keeping the pledges pawned. See the notes to *Coggs v. Bernard*, (1 Sm. L. C. 194 (5th ed.)). To my mind, pawnbrokers' pledges are within the principle to be extracted from the cases referred to. Then, is the plaintiff entitled to have the full value? It is said, that as he only holds them for the money he has advanced upon them, his right to recover is limited to that amount. But *Johnson v. Stear* has no approximation to this case, because here the landlord is an absolute wrongdoer. Having no colour of right, he comes and takes the goods away. The bailee is entitled to the full value from the defendant. He will then repay himself his own interest, and hand over the surplus to the pledgor.

WILLIAMS, J.—I am of the same opinion. I think these goods were privileged, on the general ground that they were in the hands of a pawnbroker, to take care of in the way of his trade. It is just the same principle as that of the goods in the hands of a wharfinger, and in *Brown v. Shevill*. As to the damages, it is clear that, the distrainer being a wrongdoer, the plaintiff may recover the full value from him. As to the right to sell at the end of the year giving the landlord a right to distrain, there is no analogy between the two rights.

KEATING, J., concurred.

Rule discharged.

Ex.

18 JAN. 1865.

} BOOSEY v. WOOD.

Libel—Accord and Satisfaction.

To a declaration for libel the defendant pleaded accord and satisfaction, by an agreement between the plaintiff and himself to accept mutual apologies, to be published by them respectively in certain newspapers:—Held, on demurrer, that this was a good plea.

Declaration—For libel published of the plaintiff by the defendant in a certain newspaper.

Plea—Accord and satisfaction, by an agreement between the plaintiff and the defendant to accept mutual apologies, to be published by them respectively in certain newspapers.

Demurrer and joinder in demurrer.

Joyce, in support of the demurrer.

This plea is bad, for it shows no satisfaction. The agreement to accept is the accord, but there is no averment that the apologies were accepted.

He referred to

Lane v. Applegate, 1 Stark. 97.

[MARTIN, B.—That case is a strong authority for the defendant. It was there held, that a similar defence to that now set up is good, and may even be raised under the general issue.]

Needham, contra, was not called upon.

PER CURIAM.—The objection to the plea cannot be sustained.

Judgment for the defendant.

Ex. } *McGINN v. COLES.*
27 JAN. 1864.

Practice—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—Composition Deed—Fraud.

A debtor executed a composition deed under the 192nd section of the Bankruptcy Act, 1861. The sheriff, at the suit of a creditor, subsequently took possession of his goods under a writ of *fi. fa.* On motion for a rule calling on the sheriff to give up possession, affidavits were read on the part of the creditor (as plaintiff) to the effect that the requisite number of creditors had not assented to the deed as alleged, and that the deed was, therefore, void by reason of fraud. This was contradicted by the defendant's affidavits, and it was thereon ordered that the Master should report upon the facts affecting the validity of the deed, and that the sheriff (if the money were not paid by a certain date) should sell the property, and pay the proceeds into Court.

The defendant in this suit duly executed and registered a composition deed under the 192nd and following sections of the Bankruptcy Act, 1861. The sheriff afterwards, at the suit of one of the creditors, took possession of his goods under a *fi. fa.* Application was made to Bramwell, B., at Chambers, for a Judge's order, calling on the sheriff to give up possession. The learned Judge referred the question to the Court.

Mellish, Q. C., moved for a rule accordingly.

The only question is, is the deed a good deed? If so, the sheriff must withdraw. He referred to the 198th section of the statute.

Crompton, contra.—The deed, though good on the face of it, is fraudulent, and therefore void, for the affidavits of the plaintiff show that "a majority in number representing three-fourths in value" of the

creditors, have not really assented as required by the statute.

He read the affidavits of the plaintiff to support this statement, which was contradicted by the defendant's affidavits. Other objections to the deed were raised, and reference was made to the following cases:

Clapham v. Atkinson, 4 N. R. 379; 33 L. J. Q. B. 81; 4 B. & S. 772;

Mayer v. Underhill, 9 L. T. 289;

Dechurst v. Jones, 4 N. R. 343; 33 L. J. Ex. 294;

Stone v. Jellicoe, 34 L. J. Ex. 11;

Dingwall v. Edwards (judgment of Crompton, J.), 3 N. R. 642; 33 L. J. Q. B. 161; 4 B. & S. 738;

Keyes v. Elkins, 5 N. R. 218; 34 L. J. Q. B. 25 (judgments of Crompton and Mellor, JJ.);

Ex parte Morrison, 33 L. J. Bky. 47.

But these objections became immaterial; for on the question of fraud,

MARTIN, B., said; it is impossible for the Court to decide this question without a full knowledge of the facts. The proper course to be pursued is this: the Master must report upon the facts affecting the validity of the deed; and the sheriff, if the money be not paid by a certain date, must sell the property, and pay the proceeds into Court.

The rest of the Court concurring, an order was made accordingly.

Rule refused.

Ex. } *MASON and Others v. MITCHELL.*
27 JAN. 1865.

Protection Order—Unlawful Gains of Married Woman—20 & 21 Vict. c. 85, s. 21.

A married woman, after having deserted her husband, acquired certain property by keeping a house of ill fame, and on her death her husband having taken possession of the property, she having, without her husband's knowledge, in 1857, obtained an order under the 20 & 21 Vict. c. 85, s. 21, which enacts that "A wife deserted by her husband, may at any time after such desertion, if resident within the Metropolitan district, apply to a Police Magistrate, or if resident in the country, to Justices in Petty Sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such Magistrate, or Justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband, and all creditors and persons claiming under him; and such earnings and property shall belong to

the wife as if she were a feme sole: provided always, that every such order, if made by a Police Magistrate or Justices at Petty Sessions, shall within ten days after the making thereof be entered with the registrar of the County Court, within whose jurisdiction the wife is resident, and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the Magistrate, or Justices, by whom such order was made, for the discharge thereof: provided always, that if the husband, or any creditor or other person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which suit she is thereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation":—

Held, *that the order does not protect such property as against the husband.*

This was an action brought by the administrators of Mary Wilde to recover the proceeds of certain goods sold by the defendant, an auctioneer, under the authority of the husband. The action was tried before Justice Blackburn at the last Liverpool Assizes.

The material facts are as follow:—

Mary Wilde married John Wilde in 1847; she committed adultery, and in 1857 left her home of her own accord; she then lived with a man named Saunderson, and kept a brothel. In the same year she and Saunderson went to a magistrate and obtained an order, under the 20 & 21 Vict. c. 85, s. 21, to protect her property, without the knowledge of her husband. She purchased the furniture in question from her gains in the above trade. She died in 1864. Immediately after her death, to the knowledge of the plaintiffs, John Wilde took possession of the furniture, and employed the defendant to sell it; the plaintiffs set up no claim to it until some months afterwards. The plaintiffs had obtained limited administration to the effects of Mary Wilde. The jury found that there had not been desertion by the husband; that the protection order had been obtained by fraud; and that the goods in question were not the earnings of lawful industry, but profits derived from prostitution. A verdict was found for the plaintiffs for 46*l.*, leave being reserved at the trial to enter a nonsuit for the defendant.

A rule *nisi* having been obtained in due course,

Quain now showed cause against the rule.

It is enacted by the 20 & 21 Vict. c. 85, s. 21, that the wife is to be in the same position after her deser-

tion and after she has obtained an order from the Justices, as if she had obtained a decree of judicial separation; as to her future earnings, the 25th and the following sections place a woman judicially separated in the same position as a *feme sole*. This order is conclusive of the facts set forth in it, until it is set aside, even if it was obtained by fraud.

He cited,

Brittain v. Kinnaird, 1 B. & B. 482;
Crepps v. Durden, 1 Sm. L. C. 568;
 1 Wms. Saund. 92*b*;
Aldridge v. Haines, 2 B. & Ad. 395;
Paley on Convictions (Macnamara) 390;
Strickland v. Ward, 7 T. R. 633;
Duchess of Kingston's Case, 2 Sm. L. C. 593;
Perry v. Meddowcroft, 10 Beav. 122;
Patrick v. Shedden, 1 Macq. 535;
Williams on Executors, 450;
Terry v. Newman, 15 M. & W. 450;
Manby v. Scott, 2 Sm. L. C. 372.

The statute protects all the property she may acquire by her lawful industry, or otherwise.

The other statutes on the subject are the 21 & 22 Vict. c. 108, ss. 6, 7, 8 (which was not in existence at the time the order was made); the Scotch Act, 24 & 25 Vict. c. 86, s. 6; and the 27 & 28 Vict. c. 44. The two last statutes do not contain the word "lawful."

James, Q.C. (Holker, with him), in support of the rule.

The Legislature only intended to protect any property the wife might acquire by her lawful industry, or which she might otherwise become lawfully possessed of. The word "lawful," though only used in the first part of the section, is to be applied throughout it.

[POLLOCK, C.B.—The Legislature seems studious to give the protection only to the lawful gains of the wife, on account of the abuse it might lead to.]

[CHANNELL, B.—It is unlawful carrying on a business which will render a person liable to be indicted.]

It is not until a certain state of things exist that the magistrate has jurisdiction, namely, desertion by the husband.

[He was here stopped by the Court.]

POLLOCK, C.B.—The order that is to be given by the magistrates to the wife for the protection of any money or property acquired by her industry confines it to the legal fruits of her legal industry; if I was to decide otherwise, I should be saying that the Legislature intended to give encouragement to vice, and to the desertion of the husband by the wife for lewd purposes. The rule for a nonsuit will, therefore, be made absolute.

CHANNELL and PIGOTT, BB., concurred.

Rule absolute.

Ex. } **STONE v. STRANGE.**
31 JAN. 1865.

*Inspection of Documents—14 & 15 Vict.
c. 99, s. 6.*

In an action for breach of promise of marriage, the defendant applied for the inspection and discovery of his letters, under the 14 & 15 Vict. c. 99, s. 6, and 17 & 18 Vict. c. 125, s. 50 :—

Held, that the defendant was entitled to inspect them.

The action was for the breach of promise of marriage. The letters written by the defendant to the plaintiff were alleged to contain the promise.

A rule having been obtained, calling on the plaintiff to show cause why the defendant should not inspect and take copies of the letters written by him to the plaintiff, or why the plaintiff should not answer in an affidavit, stating what documents she has in her possession or power relating to the matter in dispute in the cause; what she knows as to the custody of such documents, or any of them; and whether she objects, and if so on what grounds, to the production of such as are in her possession, control, or power;

Prileaux showed cause against the rule.

What the defendant wants to find out is, where the weak points in the plaintiff's case appear to be.

[POLLOCK, C.B.—What he wants to know is, what he wrote himself.]

I suspect he wishes to know whether his letters contain anything amounting to a promise to marry. This is the same as the breach of any other contract. The affidavit merely states that the defendant will be prejudiced,

Sneider v. Mangino, 21 L. J. (N. S.) 121;

Shadwell v. Shadwell, 6 C. B. (N. S.) 679.

H. T. Cole, in support of the rule, cited,

Pierce v. Harrison, 6 C. B. (N. S.) 679.

POLLOCK, C.B.—The defendant is entitled to inspect his letters.

CHANNELL and PIGOTT, BB., concurred.

Bail Court. } **EVANS v. PROSSER.**
31 JAN. 1865.

*Service of Rule to pay Money—Acceptance of
Service by Attorney.*

In a case where it was sought to make a rule for the payment of money, pursuant to an award, absolute, and the rule had not been served on the defendant, but had been served on the attorney who acted for the defendant in the reference, and who had accepted service as on behalf of the defendant :—

Held, that such service was not sufficient.

On a previous day in Term a rule had been obtained

calling upon the defendant to show cause why he should not pay money, pursuant to an award.

R. G. Williams now moved to make the rule absolute.

It appeared that efforts had been made to serve the rule upon the defendant, but personal service had not been effected. There was nothing, however, to show that the defendant was keeping out of the way to avoid service. The rule had been served upon the attorney who had acted for the defendant in the reference, and the attorney had indorsed upon the original rule that he accepted service on behalf of the defendant, and consented on his behalf that the rule should be made absolute.

BLACKBURN, J.—I think the service here is not sufficient. It is possible that the attorney may not have had the authority of the defendant to accept service of this rule. In these cases it is necessary that the rule should be personally served, unless all reasonable efforts have been made to serve the defendant, and there is reason to believe that he is keeping out of the way. The rule may be enlarged, and the defendant may show cause at Chambers.

Rule enlarged accordingly.

C. C. R. } **REGINA v. MUTTER.**
21 JAN. 1865.

Coram—ERLE, C.J., KEATING, BLACKBURN, and
MELLOR, JJ., and CHANNELL, B.

*Larceny—Adulterer—Control of Mistress over
Man-servant.*

A servant who runs away with his master's wife, animo adulterii, and takes with him his master's goods, knowing they are his, is guilty of larceny.

The Court were asked to quash the conviction on the ground that the man-servant was acting under the control of his mistress. The conviction was affirmed.

The prisoner was tried at the Devonshire Quarter Sessions, October, 1864.

The first count of the indictment charged him, as the servant of Samuel Fluellen, with stealing some spoons, a watch, &c., the goods of the said Samuel Fluellen. The second count, with simple larceny of the same goods.

It was proved, that the prisoner was the servant of Samuel Fluellen. That on the 27th of July, he returned with his master, and his master's wife, from the Exmouth Regatta. That on the road, Samuel Fluellen had a quarrel with his wife. And that in consequence of this quarrel, Mrs. Fluellen did not sleep at home that night, but sat up with the prisoner's mother in her house. The prisoner went to bed. The next morning, the 28th, Mrs. Fluellen was seen running to and fro, between the house of the prisoner's mother and

her own home. The prisoner brought a box out of prosecutor's house, and put it into a fly in which he drove off. On the 30th of July, the prisoner was found with Mrs. Fluellen in a bedroom at the Commercial Coffee-house, Bath. They had been there two nights, and had occupied one bedroom. On being charged, the prisoner said, "I have not stolen anything; what I have taken away, is with her consent," nodding to Mrs. Fluellen. She then said, "Yes, I told him to get a fly, and take the boxes." A watch was taken from the prisoner's person which had been given to Mrs. Fluellen before her marriage; but which, her husband said, she had given to him very soon after their marriage. The spoons, &c., the property of Samuel Fluellen, were found, in the room in which the prisoner and Mrs. Fluellen had slept, in a box which the prisoner had admitted to be his. The prisoner said, "I did not know the silver was there. The watch is Mrs. Fluellen's, I got it from her."

Mrs. Fluellen being called for the defence said, that she ordered the prisoner to get a fly, and take away the boxes, because she was going to leave. The prisoner did not know of her putting the spoons, &c., into the box. The box was locked, and she kept the key.

It was objected that the charge against the prisoner could not be maintained, on the ground that he was acting under control of his mistress, and that she could not be charged with stealing from her husband.

The prisoner was convicted.

Cartier, for the prisoner.

It is to be observed that the recent cases of this kind have not been argued,

Regina v. Thompson, Don. C. C. 549;

Regina v. Featherstone, 1 Dears. C. C. 369; s. c. 23 L. J. M. C. 127;

Regina v. Berry, 1 Bell, C. C. 95; s. c. 28 L. J. M. C. 70.

To constitute a larceny the prisoner must assume a dominion over the goods,

Regina v. Thorborn, 1 Den. C. C. 387; s. c. 18 L. J. M. C. 140,

and that without any colour of right. But in this case the wife expressly says that she "ordered" the prisoner to take away the boxes, and that she herself put the spoons, &c., into the box without his knowledge. The prisoner is a youth of eighteen, the woman is over forty. It is reasonable to suppose that he was acting under her direction and control. The watch was what was chiefly relied on, but that was the wife's own property before marriage. As to the other goods: there was no preconcerted intention shown, and that being the case, the mere fact of the goods being found in the room where the prisoner was, is not sufficient proof of possession,

Regina v. Rosenberg, 1 C. & K. 238.

There must be dominion and power over the goods, but of that there is no evidence.

[BLACKBURN, J.—What is evidence of dominion and power, if wearing the watch is not?]

Montagu Bere, for the Crown, was not called on.

ERLE, C.J.—On these facts there is evidence of larceny. The prisoner took what he knew to be his master's property, and went off with his master's wife *animo adulterii*.

Conviction affirmed.

C. C. R. } REGINA v. GILES.
21 JAN. 1865. }

Coram—ERLE, C.J., KEATING, BLACKBURN, MEL-
LOB, J.J., and CHANNELL, B.

False Pretences—Promissory Words—Evidence.

An indictment charged A with pretending to B, that she, A, had power to bring back B's husband to her. B went to A's house, and asked A to tell her a few words by the cards to fetch her husband back. A said she would bring her husband back, on which B gave her two six-pences and a frock. After obtaining the money, &c., A said she could bring B's husband back:—

Held, that the indictment was good; and (KEATING, J., dubitante) that there was evidence to support the conviction; that the pretence need not be in express words, as the whole transaction showed the intention.

The prisoner was tried at the Quarter Sessions for the borough of Newbury.

The indictment charged that Henry Fisher had deserted his wife, Mary Ann Fisher, and that Maria Giles falsely pretended to Mary Ann Fisher that she had power to bring back Henry Fisher to Mary Ann Fisher, and that she had power to bring him back over hedges and ditches. By means of which she obtained from Mary Ann Fisher one dress and two sixpences. Whereas, &c.

It was proved that Henry Fisher had run away from his wife, and that on the 18th of April, Mary Ann Fisher went to the prisoner's house and asked the prisoner to tell her a few words by the cards to fetch her husband back. The prisoner then asked how much money she had, and when told that she had only sixpence, said that that would not be of any use at all. Mary Ann Fisher then gave her another sixpence, on which the prisoner said her price was high, it was five shillings, and asked Mary Ann Fisher if she had a cloak at home, or anything on which she could leave. She answered that she had a petticoat, but it was old, and the prisoner said that would be of no use. Mary Ann Fisher having two frocks on, the prisoner told her to leave the under one, which she did. The prisoner told Mary Ann Fisher that she *could* bring her husband back after she had got the frock, &c. She said she *would* bring him back before she got the money, &c. Henry Fisher did not come back.

Mary Ann Fisher parted with the frock and money

on the faith of what passed between her and the prisoner on this occasion.

It was objected that there was no evidence to go to the jury in support of the indictment, and that the false pretence alleged was not within the statute.

The case was left to the jury, the Recorder telling them "they ought not to find a verdict of guilty unless they were satisfied that the prisoner intended to pretend to Mary Ann Fisher, and to induce her to believe that she, the prisoner, had power to bring her husband back; and that she did so knowing such representation was false, and that Mary Ann Fisher was induced by means of that pretence, and on the faith of its being true, to part with her money," &c.

The questions are—

1st. Whether there was evidence to go to the jury in support of the conviction.

2nd. Whether the false pretence alleged was one within the statute.

Harrington for the prisoner.

1st. The indictment is bad. It shows no false pretence of an existing fact. It merely states that the prisoner pretended she had the "power" to bring back the husband of the prosecutrix. What that "power" is it does not explain. It might mean moral, physical, or supernatural power,

Regina v. Douglas, 1 Moo. C. C. 462.

Besides, this offence is made the subject of special enactment,

Regina v. Fry, 7 C. C. C. 394.

2nd. There is no evidence to support the charge, for the false pretence was made after the money was obtained,—the previous words amounted only to a promise,

Regina v. Brookes, 1 F. & F. 502.

[BLACKBURN, J.—The false pretence need not be in express words,

Regina v. Copeland, 1 C. & M. 516.]

There is no evidence that the prisoner did not at the time believe that she had the power to which she laid claim.

Montagu Williams, for the Crown.

The false pretence need not be in express words. The whole conduct of the prisoner from the commencement of the interview must be looked at.

Harrington, in reply, cited,

Regina v. Codrington, C. & P. 661.

ERLE, C.J. — The first question is, whether the indictment is good. I think the pretence of possessing a power, whether physical, moral, or supernatural, made with the intention of obtaining money, is sufficient. That is what the indictment alleges, and the indictment is good. The second question is, whether there was evidence to support the conviction. A false pretence, to be indictable, must be of a present or past fact. A promissory pretence is not sufficient. It has been urged upon us that the prisoner said she

"would" bring back the husband, and that on that promise the money was parted with, and that it was not till after the money was obtained that she said she "could" bring him back. But the whole of the evidence is to be taken together. And looking at the whole transaction, I think that the prisoner intended Mrs. Fisher to believe that she had the power to bring back her husband. I think there was evidence to go to the jury that she was a fraudulent impostor.

KEATING, J.—I have had considerable doubt how far it appears on the evidence that the money was obtained by a false pretence. The words which preceded the payment of the money are only promissory. The Court, however, thinks that the whole transaction should be looked at together, and though I have some doubt, I do not dissent.

Conviction affirmed.

Probate. } In the Goods of MATHILDA GAROT,
24 JAN. 1865. } Deceased.

Administration to Person not primarily Entitled
—Discretion of Court under section 73 of
Probate Act (20 & 21 Vict. c. 77).

A married woman died in 1859 intestate, her husband her surviving. There were no children of the marriage. The husband, since the death of his wife, had resided abroad, and was indebted to the mother of his deceased wife in 122l., for which sum a judgment had been some time since obtained against him by default. Under the will of a third person the deceased was entitled to a legacy of 100l., "independent of her husband, and payable on the death of her mother." The husband, whose address was unknown, had not had notice of the present application.

On motion for administration to the mother, of the personal estate of the deceased, the Court held, that sufficient ground had not been laid for the grant under section 73 of the *Probate Act*, to the exclusion of the husband.

This was an application for a grant of letters of administration under the following circumstances:—

Matilda Garot died intestate in 1859. Under the will of one Bishop she was left a legacy of 100l., directed by the will to be "independent of her husband, Melchura Garot, and payable on the death of her mother, Mary Summers." The husband was now, and had been for some time, indebted to the said Mary Summers in 122l. for debt and costs in an action in which he had suffered judgment by default. He is a foreigner and continental travelling servant, and has been chiefly, if not altogether, resident abroad since the death of the said Matilda Garot his wife. There were no children of the marriage.

J. Morgan Howard moved for administration to

Mary Summers, under section 73 of the Probate Act, 20 & 21 Vict. c. 77, which empowers the Court, if it shall appear to the Court to be "necessary or convenient," by reason of special circumstances, or the insolvency of the estate of the deceased, to grant administration to persons other than those ordinarily entitled thereto.

[SIR JAMES WILDE.—Is there any precedent for such an application as this?]

In Goods of Cooke, 28 L. J. P. M. & A. 43.

There the affidavits averred only that it was necessary for the preservation of the personal estate that the grant should go to a particular person, and the Court thought that the necessity did not itself appear. But here the circumstances are set forth, and lead to the conclusion that it is undesirable that the husband, as a foreigner resident abroad and in pecuniary difficulty, and from whom the legator desired the legacy to be kept, should obtain administration.

[SIR JAMES WILDE.—You are applying as a judgment-creditor?]

But if the husband, under existing circumstances, may be precluded, the applicant as a judgment-creditor of the husband, and mother of the intestate, is well entitled, there being no issue of the marriage.

[SIR JAMES WILDE.—It does not appear that you have cited the husband: he has no notice of this application.]

We do not know where to find him, nor may we learn for a long time, and, possibly, fail entirely.

HIS LORDSHIP.—I do not think sufficient ground has been laid for this motion. The husband ought, under the circumstances, to have notice before the Court excludes him.

Howard asked that a grant should be made conditionally on giving the husband notice and his not opposing.

HIS LORDSHIP said, that should be the subject of an independent motion.

Order accordingly.

COMMON LAW.

Q. B. } POPE, Appellant, v. WHALLEY,
4 FEB. 1865. } Respondent.

*Markets and Fairs Clauses Act, 1847 (10 & 11
Vict. c. 14), s. 13—Shop—Stall.*

Upon an information, under the 13th section of the Markets and Fairs Clauses Act, 1847, the Justices of W. decided that a certain structure was not a "shop" within the meaning of the section, because:—1st. It was not of a stable and substantial character. 2nd. It was merely a stall, altered to evade this Act. 3rd. Though it was possible for a customer to go inside to purchase, yet, from its size and arrangement, it was obviously intended that the seller should stand inside, and the buyer outside. 4th. It did not afford protection from rain, and goods could not be safely left there at night:—

Held, that though no one of these reasons was singly conclusive, yet the Justices rightly considered them all as material elements in the case, and that the terms for which the premises were let was also an element to be considered:

Semble (per MELLOR, J.), that the word "shop" means a place fit, not only for the sale, but also for the storing of articles, according to the nature of the business there carried on: but where, from such a cause as the perishable nature of the articles, room for storing is not required, this definition does not hold.

A case stated by Justices for the borough of Wigan, in Lancashire, showed that the appellant, on an information by the respondent, had been convicted by the Justices, under section 13 of the Markets and Fairs Clauses Act, 1847, for having, on the 16th of September, 1864, in a certain place which was within the prescribed limits of the borough and of the local board of health, and was not within the limits of the market of the borough, and was not the appellant's own dwelling-place or shop, sold certain articles liable to tolls, the appellant not being a licensed hawkers. Upon the hearing, evidence was produced from which the Justices found that Wigan was an ancient borough, having an ancient market and market-place; and that the mayor, aldermen, and burgesses of the borough were the owners of the tolls, pickage, and stallage of the market. There was a local board of health constituted for the borough, under the Public Health Act, 1848, and within the borough the Local Government Act and the Markets and Fairs Clauses Act, so far as relates to markets, had been adopted and applied; there were four market days in the week; that on and prior to the 16th of September the respon-

dent was the lessee of the market, tolls, pickage, and stallage, under the corporation of the borough; a market was held within the borough on the 16th of September, and the appellant then exposed laces, tapes, buttons, and combs for sale within the borough, but not within the limits of the market as fixed by the bye-laws, but within a yard at the back of and appurtenant to a public-house; the main supports of the place where the articles were exposed for sale consisted of poles or pieces of wood, which had formerly been used as a stall in the market-place, but which had been let into the ground in the public-house yard, and for some time used as a stall there. The stall so used consisted of the upright posts fixed in the ground, of cross pieces of wood on which the counter boards were supported, and a wooden roof projecting a considerable distance beyond the counter-boards on each side, so as to shelter the seller on one side, and the customers on the other. The sellers were protected behind by a wooden frame-work. Subsequent to the conviction of a man under a similar charge for exposing goods for sale on a similar stall, the appellant's stall with others had been fitted with a door which might be locked, and a loose and a fixed window-frame, and had undergone other slight alterations. There were shelves in the appellant's structure. The structures did not adjoin, nor were they in any manner connected with any house or other building of a substantial character. They were of a slight and unsubstantial character, and were not proof against the weather. The cost of each was from 4l. to 5l., and they were let by the week, the appellant having taken her stall by the week, at the rent of two shillings per week. The occupiers of these structures were not, and never had been, rated to the poor and highway rates in respect of these structures. The appellant and other holders of similar structures had access to them whenever they thought fit. They exposed goods for sale there every day in the week.

The Justices were of opinion, on this and other evidence, and from a personal inspection of the place, that in point of law and fact the appellant's structure was not, either in its nature, construction, or use, such as to constitute it a shop within the meaning of the exception in the 13th section; 1st, because of its want of a stable and substantial character; 2nd, because it was a mere alteration of what had undoubtedly been a stall, in order to evade the provisions of the Market and Fairs Act; 3rd, because although it was possible for a customer to go inside for the purpose of buying, yet it was obvious from the very narrow space behind the counter boards, about thirty inches in breadth, and from the fact of the shutter in

front being regularly moved for the purpose of selling goods, that such was never intended, and in practice could not be the case, and that the user of this structure must necessarily be the same as of a stall where the seller stands inside and the buyer outside; and 4th, because the structure was not of such a nature as either to protect goods against rain, or render it safe to have goods of value on the premises during the night, without their being otherwise protected. And it also appearing to the Justices that the evidence brought the case within the operation of the 13th section, they convicted the appellant, but requested the opinion of this Court on the question of law, whether the place where the goods in question were exposed for sale was or not the appellant's own shop, within the meaning of the exception in the 13th section.

Keane, Q.C. (Cottingham with him), for the appellant.

On these facts, the place clearly was the appellant's own shop. The want of protection from rain and instability of character are nothing. If the appellant chose to sleep under the counter at night, this would be her "own dwelling place,"

Regina v. Caversham, 4 B. & C. 683.

The owners are the best judges of what is sufficient for the protection of themselves and their goods. As to the customers not going inside, that is a common practice at fishmongers' or butchers' shops.

[*MELLOR, J.*—Or the Lowther Arcade.]

Yes. Shops originally were much like this, without windows. The substantiality is nothing; the point is, is it the seller's own? For "own" must be read with "shop." These are let by the week, and the tenant has the exclusive occupation for the week, though no market is held on two days of the week. The object of the Act is to prevent persons from setting up stalls in the streets, to the damage of the market. This cannot be a "stall," for a stall is a thing used on the market for sales, whatever be its nature, and is so defined by *Wilde, B.*, in

Mayor of Yarmouth v. Groom, 1 H. & C. 112, where he says, "I think it is immaterial, for this purpose, of what it was constructed, and whether fixed into the ground or not."

[*MELLOR, J.*—What would be the use of a market with privileges and tolls, if any one having a yard could put up these structures?]

Regina v. Hill, 2 M. & Rob. 453; and

Regina v. Carter, 1 C. & K. 173, disregarding

Regina v. Sanders, 9 C. & P. 79, show the meaning of the word "shop" in criminal acts;

Watson v. Cotton, 17 L. J. C. P. 68, as to section 27 of the Reform Act.

[*BLACKBURN, J.*—It is immaterial what "shop" means in other Acts. What does it mean here? Have you any cases to show what sort of selling at Common

Law would be held an infringement of the rights of the lord of the market?]

Mayor, &c., of Macclesfield v. Chapman, 12 M. & W. 18;

Comyn's Digest, "Market," F;

Wiltshire v. Willett, 31 L. J. M. C. 8, and 11 C. B. (N. S.) 240;

Wiltshire v. Baker, 11 C. B. (N. S.) 237;

Llandaff Market Company v. Lyndon, 30 L. J. M. C. 105, and 8 C. B. (N. S.) 515.

Field, Q.C. (*Le Breton* with him), for the respondent.

This Court will not reverse the decision unless it is quite clear that the Justices are wrong, and have mistaken some point of law. *Johnson's Dictionary* defines "shop" as a "magazine." It must be fit for storing goods, even if goods are not actually stored there. These places are not fit for storing. Webster defines it as a "repository," or "building;" and *Richardson* "something shops or shopen (in contradistinction from a stall), for the purpose of containing merchandise for sale, protected from the weather." At the winter fair in Paris, far better structures than these are put up, but no one would call them shops. These persons have tried to make these stalls into shops to evade the Act, but have not done enough.

Keane, Q.C., replied.

BLACKBURN, J.—In this case I think the judgment of the magistrates must be affirmed. The question turns entirely on the construction of section 13 of the Markets and Fairs Clauses Act, 1847, 10 & 11 Vict. c. 14, which says that "after the market-place is open for public use every person other than a licensed hawk, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

The first question then is, what is meant by the word "shop." Looking at the object of this Act, viz., to protect the interests of the market, we may arrive at the intention of the Act in reference to such an object by considering what was the law before the passing of this Act, as to a grant of a market. *The Mayor, &c. of Macclesfield v. Chapman*, shows that it was the better opinion that an ordinary grant did not of itself confer the right to restrain all persons from selling in their own shops out of the limits of the franchise. Such a right might exist by prescription in the lord of the market, but it was not part of the incidents of a grant by charter; an ordinary grant did not of itself imply a right to restrain every one from selling in his own private shop out of the market. In *Mosley v. Walker* (7 B. & C. 53), it is said that in *Mosley v. Chadwick* it was decided "that the lord having a right of market in a particular place, a stranger could

not lawfully set up what in reality was a different market in that place." That was the test, where the Crown granted a right of franchise by modern charter. If some one set up what was really a different market within the limits of the franchise, then the person setting it up was liable to an action for injury which he did to the grantee. Here the substantial meaning of this section is, that whenever it appears the seller sells in a shop which is private and permanent he is to be within the exception, just as before the Act he would not have been liable to an action. But whenever a man does not sell in his private shop, but sets up a private market of his own, and so would have been liable before the Act to an action at Common Law, there the section imposes a penalty. In this particular case, what the Justices had to consider was, is this place the seller's permanent, real private shop? If it is, it is within the exception: if what the seller did amounted to setting up a private market, it is not within the exception. Now, in the case before us, there is no one element which is conclusive of the character of the place, but its nature is well summed up in the reasons which the Justices give for their decision. Those reasons were, first, because it was not of a stable and substantial character; secondly, because it was a mere alteration to evade the Act; thirdly, because it was unusual and inconvenient for the customer to go inside; and, fourthly, because there was no adequate protection against rain, or thieves at night. The short terms for which these places were let, would also be an element to be considered, and, in my opinion, the Justices have taken the right elements for consideration, and we cannot set aside their decision. I think also, if I had to come to a decision on the facts, I should be of the same opinion as they were.

MELLOP, J.—I think everything that could be said against the decision of the Justices has been urged, but I am bound to say that, in my opinion, if we look at the object of the Act, the intention was plainly to introduce into local Acts certain clauses (just as was done in the Railways Clauses Consolidation Act), drawn up in the form of a general Act, which should be adapted to almost all circumstances. The object of this Act was to establish fairs and markets, and as that is for the benefit of the district, the object of this section is to prevent the infringement of the privileges which would secure that benefit; but we can well understand that the Legislature would desire to protect *bona fide* sales by persons in their own dwelling-place or shops. I agree with my Brother Blackburn that no one of the reasons given by the Justices is singly conclusive of the matter, but I think they rightly considered that these, all taken together, were material elements for their decision. I abstain from saying what would have been my own decision if I had been in their place, but we cannot set aside their judgment. As to the definition of the word

"shop," I think it means something more than a place of sale; there should be room for storing goods, according to the nature of the business carried on, for linen and woollen goods, for instance, if it is a draper's business. At the same time, the absence of this is not decisive against a place being a shop in all cases, because a fishmonger's place may be undoubtedly a shop, though from the perishable nature of the articles, it may not be necessary to have room to store them. However that may be (and it is not necessary to decide that here) I think the Justices have come to the right conclusion.

Judgment affirmed.

C. P. }
22 NOV. 1864. } POWELL, Appellant, v. BORASTON,
17 JAN. 1865. } Respondent.*

REGISTRATION APPEAL

Borough Franchise—Building—Occupation as Tenant—2 Will. 4, c. 45, s. 27.

To constitute a borough voter's qualification, land can only be used as an accessory to a building to make up the requisite value, it being the intention of the Legislature that building should give the primary qualification, and that land should be a secondary resort.

The building which is required to confer the borough franchise under the 27th section of the Reform Act must be adapted for the use of man, either for purposes of residence, or of the industry to which the Act relates, and it must also have the amount of durability included in the idea of a building. The question whether a structure is such a building is one of mixed law and fact, to be answered by the revising-barrister by applying the law to the facts before him.

Watson v. Cotton, 5 C. B. 51, explained.

A farmer, who claimed to be registered as a borough voter, occupied, as tenant, land within the borough of more than the clear yearly value of 10l. At the time of the demise there was no building on the land; but afterwards, and more than a year before the 31st of July, 1864, a wooden shed was erected on it, with his assent, by a political agent, who had no interest in the land, and it was not shown that the landlord knew of its erection. The shed was supported by four posts let into the ground, its roof and sides being made of boards, and on one side these boards were broken to pieces. The claimant used the shed to keep agricultural implements in:—

Held, that the shed was not a building within 2 Will. 4, c. 45, s. 27, and that, as it was not shown that the landlord either consented to its erection or could object to its removal, nor that either the landlord or the claimant had the property in the boards if the maker of the shed carried it away, it was not occupied by the claimant with the land as tenant under the same landlord.

* This case was argued with *Powell v. Farmer*, *supra*, p. 237.

The following case was stated by the revising-barrister for the borough of Kidderminster :

"J. G. Boraston is a farmer, and for several years has rented and occupied a farm at Sutton Common, within the parish of Kidderminster foreign, but being partly within and partly beyond the limits of the parliamentary borough of Kidderminster. The greater portion of the farm, including the farm buildings, is beyond the borough limits, but a few acres of land, of more than the clear yearly value of 10*l.*, lie within the borough.

"There was no building on the land within the borough when the said Boraston took the farm of his landlord, but in the summer of 1862 a shed was placed upon the piece of land within the borough. This shed was made entirely of wood, having boarded sides and a boarded roof, and being supported by four posts let into the ground three feet. It adjoins a public road, and most of the side boards of the shed facing the road have been broken to pieces. There is no floor to the shed. It is entered by a door, and used by the tenant for keeping agricultural implements in.

"It was proved before me that the shed was erected by a builder of Kidderminster, in accordance with instructions received by him from an active political agent in that borough, who had no interest, either as landlord or tenant, in the land upon which it was erected. But previously to its erection the permission of the said Boraston was asked, and he replied that he could not give an answer ; his landlord must be asked. There was no evidence of the landlord having given such permission ; but the said Boraston gave instructions to the builder as to the size of the door of the shed, and told him that if he required it floored, he would do it himself.

"It was objected on behalf of Richard Powell, that the name of the said Boraston ought to be expunged from the said list of voters on the following grounds:—

"1st. That the shed erected as aforesaid was not a building within the meaning of the Reform Act.

"2nd. That, under the circumstances stated respecting its erection, there was no occupation of the said shed by the said Boraston, within the meaning of the Reform Act.

"3rd. That the shed formed no part of the property for which the said Boraston paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

"I held the contrary of these objections, and decided to retain the name of the said Boraston on the said list. If the Court shall be of opinion that my decision was wrong, the name of the said Boraston is to be expunged from such list."

Keane, Q.C., for the appellant.

The shed as described in this case is not a building within the meaning of 2 Will. 4, c. 45, s. 26. In

R. v. Londonthorpe, 6 T. R. 377,

a post windmill put up by a tenant, who could remove it at his will, was held a chattel ; and so machinery

partly fixed with screws to the wooden floor of a mill, and in part let into the stone floor and secured with molten lead, was held distrainable for rent,

Helarwell v. Eastwood, 6 Exch. 295.

Here the shed was merely a moveable cover for agricultural purposes.

2nd. The shed was not occupied by the respondent with the land as tenant under the same landlord. It was erected by a third person with the tenant's assent, but the landlord knew nothing of it ; and it might have been removed at any time,

Blues v. Mawc, 2 Sm. L. C. 141 (5th ed.).

Karslake, Q.C. (*Hon. R. Bourke*, with him), for the respondent.

When the revising-barrister finds an erection to be a building within the Act, and gives such a description of it as does not necessarily show that it cannot be so, the Court will not interfere with his decision,

Watson v. Cotton, 5 C. B. 51.

The description here is consistent with the structure being a large and substantial warehouse.

If structures like this are not removed during the term they become part of the freehold and descend to the heir. If then this is a building, it is part of the holding under the landlord, and it is used for the purposes of the respondent's trade. It makes no difference that it was erected by a third person. If the trade that is carried on happens to alter, it is hard that what is a good qualification one year should not be so the next ; and it would be very inconvenient to have to ascertain on each registration how the occupier had used the land and building,

Henrette v. Booth, 3 N. R. 124, 33 L. J. C. P. 61 ;

Devhurst v. Fielden, 7 M. & Gr. 182.

Keane, Q.C., in reply—

The shed was a removeable fixture, and was never let to the claimant, and it was not in the nature of a house, shop, or warehouse, nor was it used as such,

Martin v. Roe, 7 EL. & BL. 237 ;

Wansbrough v. Maton, 4 Ad. & E. 884 ;

R. v. Otley, 1 B. & Ad. 161.

Cur. adv. vult.

17 JAN. 1865.

ERLE, C.J., now delivered the following judgment of the Court (*Erle, C.J.*, *Byles* and *Keating, JJ.*)—

The respondent occupied a farm, of which a few acres, worth more than 10*l.* annually, were within the borough, and on this part of the farm there was no building at the time of the demise, nor for years after. In 1862 an electioneering agent, having no interest of any sort in the land, caused a shed made of boards nailed to posts to be erected, and therein the respondent had kept some agricultural implements. There was no evidence that the landlord had any knowledge on the subject. The revising-barrister decided that this shed was a building within the statute, and that it was occupied by the respondent as tenant ; his decision is the subject of this

appeal, and I am of opinion that it should be reversed on both points.

The Legislature has not defined with clearness the qualification for a vote in a borough. In a county all that is comprised under the term "land" is the principal source of qualification. But in a borough land alone does not qualify; it can only be used as an accessory to a building for the sole purpose of making up the value of 10*l*.

The intention of the Legislature respecting a qualification for a borough was much considered in *Cook v. Humber* (11 C. B. (N. s.) 33). It is there laid down (p. 41), that "the qualification is compounded of four elements—tenement, value, [occupation, and estate. There must be for tenement a house, warehouse, counting-house, shop, or other building analogous thereto; there must be for annual value, 10*l*.; there must be occupation, that is actual exercise of the rights of an owner in possession during the requisite time; there must be an estate in the tenement, either of fee or less. If these four distinct elements are combined in the claimant, he is qualified: if otherwise, he is not. Now, although they must exist in combination in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained. First. Is the claimant tenant? Second. Is he occupier? Third. Is the tenement sufficient in value? Fourth. In kind?"

Again in pp. 44, 45, it is said: "The statute required some permanent occupation of and some independent interest in, the property. The permanence prevents the sudden creation of votes. The ownership or the tenancy, with rating, indicates some independence; in other words the requirement of at least a tenancy excludes some occupations of less independence; such as the occupation of servants . . . and objects of charity." "As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential, and those used for commercial purposes—house for residence—warehouse, counting-house, shop, or other analogous building for commerce."

To apply these principles to the present case. We think that the so-called building is not of the class specified in the statute; that is, it is neither in the residuary class, nor in the class connected with commercial industry. We also think the claimant's occupation thereof was not in the capacity of tenant.

As to the first question, whether the so called building is sufficient to qualify, we are aware of the impossibility of defining clearly what is included in the class described in the statute by the words "other building," and of the difficulty of affirming that a thing is not in a class when the boundary of the class is unknown. We are also aware of the immense variety of structures which are sufficient buildings, considering the locality, and the use for which they are adapted in that locality. Still we are of opinion that the intention of the Legislature would be defeated,

and the words indicating the class of buildings which qualify would be without any effect, if everything which could be called a building was held sufficient. It ought to be in some degree adapted both to be used by man, either for residence or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building. The shed in question fulfils neither of these conditions. The boards were nailed to the posts for the purpose of performing the part of a shed to the revising-barrister, not for any purpose connected with the interest of the occupier, and the structure was so frail as to have been destroyed in part before the required year had elapsed. The Legislature intended that building should give the primary qualification, and that land should be a secondary resort, if the building was not worth 10*l*. per annum; but land would become the primary qualification if a shed of no value, added to land of the required value, was held to qualify.

We are aware that the question whether a building qualifies is more a question of fact than of Law, to be answered by the revising-barrister performing the part of a jury in applying the Law to the facts before him. We are also aware of the soundness of the principle laid down in *Watson v. Cotton* (5 C. B. 51), that if the revising-barrister finds the building in question to be within the statute, the Court will make every presumption for the purpose of supporting his finding, and will not reverse it unless the case shows it to be erroneous. We adopt these principles as sound; still we think that this decision is shown to be erroneous.

The case of *Watson v. Cotton* has been treated by some text-writers as if it had decided that a tarpaulin supported by poles, as described in that case, was a building within the statute, and they have drawn wide inferences therefrom; and these inferences are carried to the farthest extent in 2 Lutwyche's Reports, p. 58. The learned reporter, in a note there, speaking of this case, thus expresses himself:—"It will not be easy in future to say what is not a building, however slight and unsubstantial the structure may be, provided there be a roof to it." And he goes on to say, "If a building be capable of holding and protecting any articles, whether of a perishable nature or not, it may fairly be considered a warehouse." And again, that on these principles there is "no reason why a party may not be qualified to vote for a borough in respect of his occupation of a fowl-house, a donkey-shed, or a pig-stye, if the land occupied therewith will make up the required annual value." The report of this case in 5 C. B. 51, does not warrant the inference thus drawn from it. It appears there that the Judges, resolving to support the finding of the barrister, unless he states facts showing that he must have been in error, take his description to be incomplete, and assume that the description, if it had been complete, would have

shown that the shed was a building in the ordinary sense of the word, and was properly included in the same class as warehouse. In p. 52, Maule, J., says, the barrister "gives us a description embracing some of the incidents of a building. He describes two sides of the structure: *the rest may be of solid masonry*. He does not profess to give a full description of it." And Wilde, C.J., says (p. 53), "It is possible to conceive sheds of a very substantial and valuable character; for instance, the sheds in the docks, which for the most part consist of columns of iron or stone supporting slated roofs." Then, in his judgment, Wilde, C.J., says, "the revising-barrister having found it to be a building within the Act, I must assume that it has all the requisites to constitute a building, except the incidents he sets out;" and Maule, J., says, "*It is not denied that the shed in question is a building*. . . . When once it is established that the thing is a building, the only question that remains is to be decided by the uses and purposes to which the building is or may be put. If it is or may be applied to the purposes of a building such as is mentioned in the Act, it clearly may be said to be a building within the meaning of the Act. Its being more or less substantial cannot affect the question. Nobody would for a moment doubt that a place constructed at great expense, and of great solidity, closed on two sides, and used for the stowage of goods, would be a building within the Act. Assume this to be a building, and in what does that differ from this?" It is observable that the shed in *Watson v. Cotton* was *bond fide* used in connection with, and for the purposes of, a wharf.

It thus appears to us that the Judges did not hold the shed as described to be a building within the Act; but they declare it to be their duty to assume any possible facts, not excluded by the case, for the purpose of affirming the barrister's finding. The barrister finds it to be a building: that finding is to stand, unless the case excludes the possibility of its being a building: and the Judges say that, consistently with the case, the shed may have been on two sides of solid masonry, and may have been of a very substantial and valuable character, and may have been used for the stowage of goods. We may remark that it would have been better if the case had been sent back for re-statement, as Mr. Gray requested.

The argument of that learned counsel on behalf of the appellant seems to have been considered by the Court as perfectly sound in law; but it did not prevail, because the facts were presumed to exist which made it irrelevant. Mr. Gray contended that the building must be something substantial—something *ejusdem generis* with those specifically mentioned—and not a mere temporary erection for the more convenient use of the land, that could be removeable by the tenant: and none of the Judges disputed the correctness of this view of the law.

In deciding whether a building is within the Act, the revising-barrister is bound to give effect to the in-

tention of the Legislature expressed in the statute, and in so doing to be assisted by any rule of construction laid down in any of the cases relating thereto; but his attention should never be turned from the statute which he has to apply. And though general principles of construction laid down by the Judges may help to guide his decision, the specific facts of one case form a very fallacious guide in the decision on other specific facts supposed to resemble them. The specific facts of the tarpaulin on poles, seem to have led to unsound conclusions.

In the present case we consider that the description of the shed is complete, and according to that description it was not of a substantial character, nor *ejusdem generis* with the buildings specifically mentioned—that is, it was neither adapted to nor intended for any purpose analogous to the purposes for which warehouses are used. We, therefore, think that the decision holding the shed to be a building within the Act, must be reversed.

Secondly. If the shed is taken to be a building within the statute, then the question is raised, whether it was occupied by the respondent in his capacity of tenant: and the answer is in the negative.

It is clear that the shed formed no part of the premises demised at the time of the demise; and although it might become parcel of the freehold by being annexed thereto under certain conditions, and so become parcel of the demised premises during the currency of the term, the case does not show that it was made under such conditions as would vest the property in the landlord, subject to the interest of the tenant during the term. It is an incumbrance brought on the land by the licence of the tenant, and, for aught that appears, subject to be removed at the will of the incumbrancer, or on the revocation of the licence by the tenant.

The building—not the land—is the substance of the qualification: the respondent cannot hold the shed as tenant, unless the landlord has the property in it as reversioner; but the landlord is not shown to have assented to its being brought, neither is there any ground for affirming that he could object to its removal; nor does it appear that either landlord or tenant has the property in the boards if the maker of the shed carried it away.

Decision reversed.

C. P. } POWELL, Appellant v.
22 NOV. 1864. } FARMER, Respondent.
17 JAN. 1865. }

REGISTRATION APPEAL.

Borough Franchise—Building—Occupation as Tenant—2 Will. 4, c. 45, s. 27.

A market gardener, who claimed to be registered as a borough voter, occupied, as tenant, land within the borough of more than the clear yearly value of 10l. At the time of the demise, there was no building on the land, but afterwards, and more than a year before the 31st of

July, 1864, he erected a shed on the land, with boarded sides and a thatched roof, and supported by posts let into the ground, and with a padlocked door. In this shed he stored potatoes. The revising-barrister held that the shed was a building within the 27th section of the Reform Act, and that it was occupied by the claimant with the land as tenant under the same landlord, and retained the claimant's name on the register :—

Held, on the principle of *Watson v. Cotton*, 5 C. B. 51, that there was not sufficient in the description and facts stated in the case, to authorise the Court to reverse the revising-barrister's decision.

Quere, whether a pig-stye is a building within 2 Will. 4, c. 45, s. 27.

The following case was stated by the revising-barrister for the borough of Kidderminster :—

"William Farmer is a market gardener, and for the purposes of that business, had rented and occupied, under the same landlord, five acres of land in the parish of Kidderminster Borough, for more than twelve calendar months next previous to the last day of July, 1864, of the clear yearly value of 20*l*.

"There was no building on the land when the said William Farmer first took the same of his landlord, but previously to the 31st of July, 1863, the said William Farmer had erected on the land, at his own expense, a wooden structure, with boarded sides and a thatched roof, and supported by wooden posts let into the ground. The entrance into the structure was by a door fastened by a padlock, and it was used by the said William Farmer for storing potatoes and other things connected with his business. The said William Farmer had erected in like manner on the said land a pig-stye with a slated roof, but in other respects similar to the structure before mentioned. There was no floor made to the pig-stye, but cinders were laid in the ground to keep it dry.

"It was objected, on behalf of Richard Powell, that the said William Farmer's name ought to be expunged from the said list, on the following grounds :—

"1st. That the structures erected by the said William Farmer were not, nor was either of them, a building within the meaning of the Reform Act.

"2nd. That, inasmuch as the structures had been erected by the tenant, they formed no part of the property for which he paid rent, and could not be said to be occupied by him with the land as tenant under the same landlord.

"I held that the said structures were buildings within the meaning of the Act, and that they were affixed to the freehold, and decided to retain the name of the said William Farmer on the said list.

"If the Court shall be of opinion that my decision was wrong, the name of the said William Farmer is to be expunged from such list."

This case was argued with the last (*Powell v. Boraston*, *supra*, 324), and the appellant and respondent respectively were represented by the same counsel.

17 JAN. 1865.

ERLE, C.J., now delivered the judgment of the Court (*Erle, C.J., Byles, and Keating, JJ.*)—

Upon this appeal two questions are raised : First. Whether the shed described in the case was a building within the statute ; that is, whether it had sufficient permanence, and was *ejusdem generis* with the buildings specified in the statute ; namely, house, warehouse, counting-house, shop. The revising-barrister found it to be such a building, and according to the principle laid down in *Watson v. Cotton*, we do not see sufficient in the description he has given to authorise us to reverse his decision. It is constructed of planks nailed to posts let into the ground, and used for storing potatoes, that being an article in the way of the claimant's trade of a market gardener. The second question is, whether this shed was occupied by the claimant in the capacity of tenant. As to this the facts are that at the time of the demise there was no shed on the premises, but the claimant placed it there during his term, and used it as above mentioned. The revising-barrister found that it was so occupied, and we do not see sufficient in his statement to authorise us to reverse his decision.

If the shed had become the property of the landlord, it was occupied by the claimant in his capacity of tenant, although he constructed the shed and placed it there during the term ; the general rule is *quidquid plantatur solo solo cedit*. It may be that the shed continued the property of the tenant, and was subject to be removed by him at any time during the term ; his right to do so might depend on his contract with his landlord, or on the nature of the construction being such as would make it removable as a trade fixture ; but whatever may be the right of the tenant if further facts were added upon the statement made, we act on the general presumption that things affixed to the freehold pass to the landlord, and affirm the decision. The revising-barrister has raised a further question ; whether a pig-stye is a building *ejusdem generis* with house, warehouse, counting-house, and shop. It is not necessary to answer this question, which is only raised in case the shed was found insufficient ; but we would add that we are by no means prepared to assent to the revising-barrister's opinion on this point without further discussion. We would further add, that the revising-barrister has, in our judgment, done good service in sending this and the preceding case (*Powell v. Boraston*, *supra*) to us for our decision, and giving us the opportunity of explaining what we consider to be the true meaning of the Court in *Watson v. Cotton*, and thereby putting some limitation upon the wide inferences drawn therefrom, contrary in some degree to the intention both of the Legislature expressed in the statute, and of the Judges expounding the same.

Decision affirmed.

C. P. } EATWELL, Appellant, v.
25 JAN. 1865. } RICHMOND, Respondent.

Turnpike Act—Tolls Payable Under—Description of Carriage—Nature of Licence.

A turnpike Act allowed to be taken at a toll-gate, for every horse drawing (1) any caravan, cart upon springs, &c., 4d.; (2) any stage-coach, licensed to carry not more than sixteen passengers, 5d.; more than sixteen, 6½d.; (3) any van or other such carriage for the conveyance of goods for hire, 6½d.; (4) any caravan, &c. (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers. The Act contained a clause exempting horses and carriages from liability to pay more than one toll on one day, but followed by a proviso, that for every horse drawing any stage-carriage for the conveyance of passengers for hire, for which toll should have been paid, the tolls thereby made payable should be paid for every time of passing.

E travelled with a horse and caravan, generally on fixed days, between C and B, taking for hire sometimes passengers, sometimes goods, sometimes both. He was not licensed under the Stage Carriages Act, but paid duty under 16 & 17 Vict. c. 90, Sched. D., as for a carriage principally used for carrying goods, but occasionally in conveying passengers for hire.

The toll-gate-keeper one day, in the morning, charged E for his caravan, then carrying a passenger, 6½d., and the same day, in the afternoon, for the same, then carrying goods and the same passenger on the return journey, 6½d. :—

Held, that the 6½d. was rightly charged in the morning on the caravan, under the fourth class of tolls above mentioned; but that no return toll was chargeable—the habit of the carriage, evidenced by the nature of its licence, properly regulating the toll.

Case stated by Justices of Somerset, under 20 & 21 Vict. c. 43, s. 2, to the following effect :—

At a Petty Sessions, held the 18th of June, 1864, an information was preferred by the appellant, the owner and driver of a spring van on four wheels, which travels into Bath from Chippenham and back three times a week, against the respondent, the collector or keeper of the London Turnpike Gate, charging, “for that he, the said Richmond, on the 6th day of June, 1864, at the parish of Swanswick, in the said county of Somerset, did demand and take greater toll for a horse and caravan passing through the said turnpike gate than he was authorised to do,” and was heard and determined, and upon such hearing the information was dismissed. The present case was demanded by the appellant, under the said Act.

The appellant was a common carrier living at Chippenham, and travelling between that place and Bath with a light caravan of four wheels, drawn by one horse at a pace not exceeding four miles an hour. He carried goods occasionally and passengers occa-

sionally, and sometimes both together, always for payment. He deposited passengers occasionally at their own doors when they requested it, and universally he delivered goods at their destination as directed. He was not licensed under the Stage Carriages Act, but paid the 2l. 6s. 8d. duty as for a carriers' van, under the 16th & 17th Vict. c. 90, schedule D., the material part of which is as follows :—

“For every carriage used by any common carrier, principally and *bonâ fide* for and in the carrying of goods, wares or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage carriage duty, or any composition for the same, shall not be payable under any licence by the Commissioners of Inland Revenue :—

“Where such last-mentioned carriage

shall have four wheels 2l. 6s. 8d.

“And where the same shall have less

than four wheels 1l. 6s. 8d.”

On the day in question the appellant was charged for the said caravan and horse by the respondent at the London Gate a toll of 6½d. in the morning, and a back toll of 6½d. in the afternoon, which he paid under protest.

The caravan had moveable seats, which could be put up or down. On the journey into Bath on the day in question the appellant had one passenger and no goods, except a bundle belonging to the passenger. On the return journey he had the same passenger and a packet of bacon going to Chippenham. He generally went to Bath on Mondays, Wednesdays and Saturdays, and returned the same day, leaving Chippenham at eight A.M., and Bath at five P.M. His name was in the carriers' list in the Bath directory.

The material clauses in the local Turnpike Act (10 Geo. 4, c. ex., under which Act the respondent acted, are as follows :—

“Section 6. And be it further enacted, that a sum or sums not exceeding the respective tolls following shall be demanded and taken at each and every turnpike, toll-gate, &c. (therein-mentioned, this London gate being within the description), by each and every such person or persons, &c. (as therein-mentioned, the respondent being such a person), before any horse, beast, or cattle, or any carriage shall be permitted to pass through the same; (that is to say,)

“1st. For every horse or other beast drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, phaeton, curricule, gig, caravan, cart upon springs, hearse, litter, or other such light carriage (except stage-coaches), any sum not exceeding fourpence :

“2nd. For every horse or beast drawing any stage-coach, licensed to carry in the whole, inside and outside, not more than sixteen passengers, any sum not exceeding fivepence; and licensed to carry more than sixteen passengers, any sum not exceeding sixpence-halfpenny :

“3rd. For every horse or other beast drawing any van

or other such carriage for the conveyance of goods for hire or pay, any sum not exceeding sixpence-halfpenny:

"4th. For every horse or other beast drawing any caravan, tilted waggon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers."

The rest of the section is immaterial.

"Section 7. Provided always, and be it further enacted, That it shall not be lawful for the said trustees, or their collector or collectors, lessee or lessees, to demand or take more than the respective numbers of tolls in the whole hereinafter-mentioned, for and in respect of the same horses, cattle, and carriages, for passing and repassing in any one day, to be computed from twelve o'clock in one night till twelve o'clock in the next succeeding night, along the whole line or lines of the said several roads as herein-after-mentioned (except as hereinafter-mentioned); that is to say (on various roads, and parts of roads, including the part in which the gate in question was), not more than one full toll.

"Section 9. Provided always, and be it further enacted, that for or in respect of the horses or other cattle or beasts drawing any stage coach, stage waggon, van, caravan, cart, or other stage carriage, for the conveyance of passengers for payment, hire, or reward, for which toll shall have been paid, and which shall return on the same day through the same turnpike gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat," &c.

The appellant contended, first, that his caravan was not a "stage" caravan, and therefore not liable to back toll under section 9.

Secondly. That his caravan was not *licensed*, so as to be liable to the same rate as stage coaches under the 4th clause of section 6.

Thirdly. That the respondent having elected to treat the caravan as "a van for the conveyance of goods for hire," and charged 6*d.* for it under the 3rd clause in section 6, in the morning, he could not demand such toll again the same day under section 9, which extends only to vehicles "for the conveyance of passengers."

The respondent contended that, as this was a regular conveyance for goods and passengers, between certain places, at stated times, on fixed days, it was a "stage" vehicle within section 9; and that, as the appellant carried goods for hire in his van, he had a right to charge him 6*d.* under the 3rd clause of section 6, and the same on his return under section 9.

The question for the Court was:—

What toll was chargeable under the Local Act on such conveyance as that described in the case, and whether such toll was chargeable again upon the return upon the same day of the same horse and vehicle through the same gate.

Should the Court be of opinion, that a toll of 6*d.* could be demanded both on going and returning, the decision of the Justices to be affirmed. If not, to be reversed, and in the latter case such order made in relation to the matter as to the Court should seem fit.

Kingdon, for the appellant.

This caravan must come under either the 1st or the 3rd clause of section 6. It cannot come under the 2nd or 4th, because it is not licensed to carry passengers.

Prima facie, the 7th section applies, that only one toll is to be taken on the same day.

Nor is this within the exception in section 9, which applies only to "stage carriages for the conveyance of passengers for hire." This is not such a carriage.

Again, the tolls to be paid again, under section 9, are "the tolls hereby made payable," namely, by section 6. And the only toll made payable by section 6, on stage carriages, is toll in proportion to the number of passengers, namely, for less than sixteen, 5*d.* 6*d.*, then, on returning, was at least an overcharge.

Again, having charged 6*d.*, in the morning as for a caravan, under the 3rd clause in section 6, the respondent was wrong in charging the back toll in the afternoon, as for a passenger carriage.

Karslake, Q. C., for the respondent.

It cannot be assumed that the duty paid was the duty properly payable. This caravan ought to have been licensed as a stage carriage. It was for passengers as much as for goods. It was a stage van. See,

Regina v. Ruscoe, 8 Ad. & E. 386.

[ERLE, C.J.—The idea of a "stage" is regular oscillation between two points.]

The appellant's caravan is within the 4th clause of section 7, and so liable to back toll.

[WILLIAMS, J.—You cannot treat it as a carriage for goods under the 3rd clause in the morning, and as a passenger-van under the 4th clause for the return journey. The expression in section 6 is not "conveying goods," but "for the conveyance of goods."]

At all events, the respondent might have charged it 5*d.* as a passenger-van going, and the same in returning.

Kingdon replied.

ERLE, C.J.—The first question is, whether the toll-gate-keeper had a right to demand back toll. The appellant passed from Chippenham to Bath and back, and had to pay on returning. The caravan paid duty under 16 & 17 Vict. c. 90, schedule D, as "a carriage used principally and *bona fide* for the carrying of goods, and occasionally only in carrying passengers for hire, "and in such manner that the stage-carriage duty should not be payable." That is, not a carriage licensed for the conveyance of passengers, but a carriage for the conveyance of goods, though occasionally used for passengers. Is that a carriage which is to

pay back toll under section 9! We must construe section 9 in connection with section 6. [His Lordship read the material parts of both sections.] By section 6, the rate of toll is settled by the *licence*; and though the word "licensed" is not in section 9, I think the second toll is imposed by that section only on carriages "*licensed* for the conveyance of passengers," and this is not such a carriage. The respondent's case is, that carriages which are to pay back toll need not be licensed, and that the toll-gate-keeper has a right to look at every carriage passing the gate, to see what is the purpose of the conveyance. But I think the statute imposes back toll on the habit of the carriage. It would be most pernicious to allow gate-keepers to stop every carriage, and ascertain the purpose of the journey. I think the keeper should be satisfied with the evidence of the licence (unless obtained by fraud) as to the habit of the carriage, and that there ought not to be a shifting liability, which would lead to delay and quarrelling. As to the first toll, I think 6*d.* was rightly charged under the 3rd clause of section 6.

WILLIAMS, WILLES, and KEATING, JJ., concurred.
* *Judgment for the appellant.*

*Note.**—The order made was, "That the decision of the said Justices be reversed, and that the matter be remitted to the said Justices, that they may give such judgment as they ought to have given therein, with the opinion of this Court, that the toll of 6*d.* was chargeable upon the said appellant, but that he was not liable to be charged with any return toll."

C. P. } EVANS v. WRIGHT and Another.
27 JAN. 1865. } EVANS, Claimant.

Interpleader—Where Granted—1 & 2 Will. 4, c. 58—Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, s. 12).

The Court will not refuse an interpleader only because the evidence against the defendants in the claimant's case is different to what it is in the plaintiff's case, so long as the defendants have not established any new relation between themselves and the plaintiff.

*The plaintiff occupied a farm, of which the defendants were landlords. The defendants sometimes treated the plaintiff, and sometimes his father, the claimant, their original lessee, as tenant, and gave each notice to quit. On the plaintiff quitting, the tenant-right was valued, as between him and the defendants, at 185*l.* 2*s.* 2*d.**

*Plaintiff having sued defendants for that sum, and two other sums due to him, the defendants were willing to pay the two other sums to the plaintiff, but asked that the plaintiff and the claimant should interplead as to the 185*l.* 2*s.* 2*d.*, that amount of the valuation, however, not to bind the claimant:—*

Held, that an order as prayed might be made (if not

under 1 & 2 Will. 4, c. 58,) under Common Law Procedure Act, 1860, s. 12.

Action for tenant-right, &c., against the defendants, as landlords of certain premises previously occupied by the plaintiff.

Particulars of plaintiff's claim:—

Amount of valuation of the tenant-right upon a farm, in the county of Derby, given up by the plaintiff to his landlords, the defendants, as at Lady-Day, 1863, the valuation being dated the 23rd of March, 1863, and made by valuers appointed by the plaintiff and defendants respectively—185*l.* 2*s.* 2*d.*

Value of a stock frame sold by plaintiff to defendants, the value fixed by defendants' bailiff—3*l.*

Surface damage by defendants to land occupied by plaintiff—6*l.* 5*s.* Total, 194*l.* 7*s.* 2*d.*

The plaintiff's father, Thomas Evans the elder, having claimed that the amount of the tenant-right should be paid to him, the defendants applied for an interpleader order. The summons was heard at Chambers, before Keating, J., who declined to make the order, but without prejudice to an application to the Court.

Alfred Wills, accordingly, on the 16th of January, applied for a rule to show cause why the plaintiff and Thomas Evans the elder, the claimant, should not interplead as to the amount claimed by the plaintiff in this action; and why the plaintiff and claimant should not be barred in respect thereof.

The rule *nisi* was granted in this form:—"To show cause why the plaintiff and the claimant should not appear and state the nature and particulars of their respective claims to the sum of 194*l.* 7*s.* 2*d.*, the subject matter of this action, in the said affidavits mentioned, and maintain or relinquish the same, and abide by such order as may be made thereon."

The following affidavits were produced in support of and against the interpleader summons:—

An affidavit by George Staley, the financial manager of defendants, who carry on business at Butterley as coal and iron masters, to the following effect:—

In March, 1854, the claimant became tenant to the defendants of the farm in question, but did not personally manage it nor reside there. Shortly after such letting the plaintiff resided there and managed the farm, paying rates, &c., till Lady-day, 1863. Plaintiff has ever since the first rent-day, upon which rent was paid by the claimant, paid the rents to the defendants and taken receipts in his own name. When defendants required possession of the farm they gave the usual notice to quit to the plaintiff, designating him their tenant. Such notice to quit was also given to the claimant also as tenant of the said farm. The plaintiff, at Lady-day, 1863, gave up possession to the defendants, and upon that occasion the said valuation of the tenant-right was made by valuers appointed between the plaintiff and the defendants. The other two claims also accrued. Defendants were willing to

pay the whole to the persons entitled thereto. Previously, by letter of 21st of March, 1863, the claimant's solicitors wrote to defendants that he was their tenant, and that he had permitted his son, the plaintiff, to occupy the farm, that the latter was going to leave it next Lady-day, and the claimant was going to it; that claimant had never received the amount of the tenant right he paid on entering, and that there was no necessity for a valuation, as the claimant was the tenant. On the 31st of March, 1863, the claimant gave notice to the defendants not to pay the tenant right to anyone but himself. On the 26th of January, 1864, the claimant applied to the defendants for 188*l.* 7*s.* 2*d.* as the valuation of the tenant-right. The defendants did not collude with the claimant or the plaintiff.

Affidavit by plaintiff in support of claim. That in 1859 he purchased from his father, the claimant, the tenant-right, &c., and that on quitting, it was due to him the plaintiff. That by the conduct of the defendants he, the plaintiff, became the tenant of the farm. That a large part of the claim was due to him the plaintiff, as occupant, irrespectively of the question whether he or his father were the actual tenants.

Affidavits in support of the claimant's claim.

That the claimant became tenant to the defendants in 1854, and that he paid a valuation of 168*l.* 17*s.* 9*d.* to the defendants, on the understanding that the valuation when he left should be at the same rate. That he placed his son, the plaintiff, and his sister, on the farm to manage it for him, and afterwards, after the plaintiff's marriage, to advance the plaintiff in life, he agreed with the plaintiff, that he the plaintiff should have the stock and furniture for less than half the value, which the plaintiff paid, and that he thenceforward allowed the plaintiff to take the profits of the said farm, but never authorised him to represent himself as the tenant. And at the time of the said agreement he, the claimant, expressly reserved to himself the right to the tenant-right when he should leave the farm. That after taking the farm, he, the claimant, was, for a time at least, rated in respect thereof in his own name. That the defendants always treated him, the claimant, as tenant, and as liable to them for rent, as appeared by several letters from the defendants to him; and that he never, otherwise than as above stated, gave them reason to think he had ceased to be their tenant. That the valuation of 185*l.* 2*s.* 2*d.* was made without any notice to him, the claimant, and without his authority, and after the letter of the 21st of March.

Joint affidavit by the claimant and Thomas Evans the younger:—

That, before Lady-Day, 1863, and after the notice to the claimant to quit, one of the defendants made some overtures to the claimant, to take to the farm, stating that they would not allow the plaintiff to remain there; and on the claimant saying it might

cause some unpleasantness with the plaintiff, the said defendant said to the claimant, "You are our tenant, we have nothing to do with George (meaning the plaintiff), and I am determined George shall not remain there, as he has blackguarded me in my own house." That the same proposal was repeated by the said defendant to the claimant after Lady-Day, 1863, but declined. That subsequently Thomas Evans, the younger, agreed to become tenant, but had nothing to do with the valuation, and had never been applied to for the amount of the valuation, except by a notice from the claimant to pay to him, and to no one else.

Day, for the plaintiff, now showed cause against the rule, and argued that the plaintiff had always been treated as tenant, and the valuation had been made between him and the defendants, and that he ought not to have to contest the matter with the claimant.

He cited,

Best v. Hayes, 32 L. J. Ex. 129.

Dixon, for the claimant, also showed cause against the rule, and urged that the defendants, having put themselves into the difficulty by their own fault, by treating both father and son as their tenant, could not now get the benefit of an interpleader. They have put themselves under an obligation to both parties,

Patorni v. Campbell, 12 M. & W. 277;

Crawshaw v. Thornton, 2 Myl. & Cr. 1;

Belcher and Others v. Smith, 9 Bing. 82.

[WILLES, J., cited,

Suart and Another v. Welch and Others, 4 Myl. & Cr. 305,

where Lord Cottenham puts *Crawshaw v. Thornton* on an admitted relation of principal and agent between the defendants and one of the parties.]

Besides, this is an equitable claim by the plaintiff, and so not the subject of interpleader,

Hurst v. Sheldon, 13 C. B. (N. S.) 750.

Alfred Wills, for the defendants, in support of the rule, was not heard.

ERLE, C.J.—I am of opinion that there should be a rule, that upon the landlord's paying the son (the plaintiff) the two sums of 3*l.* and 6*l.* 5*s.*, and the costs of the action up to the time of the application for an interpleader, and paying the sum of 185*l.* 2*s.* 2*d.* into Court, to abide the further order of the Court, the father and son should interplead, to ascertain which of the two is entitled to the last-mentioned sum. If the father is dissatisfied with the valuation, to which he was not a party, he is to have leave to apply to the Court for relief. The statute of William the Fourth gave discretionary powers to the Court as to what was to be done. Then the Common Law Procedure Act has provided for an interpleader in such a case as this. It is a clear satisfaction to us in

granting this interpleader, that the father and son want to make the defendants pay twice over. It is the conduct of the father and the son that has created the difficulty. As to the valuation, that is *prima facie* evidence against the father of the sum due, but he may show it is a different sum. Let the amount be settled, and then the defendants will pay the party entitled.

WILLIAMS, J.—I am of the same opinion. The only difficult point in the case is that raised by Mr. Dixon in his able argument, whether the father has not gained a right against the defendants, which he would lose if the contest were changed to a contest between him and his son. But the supposed resemblance of this case to *Crawshay v. Thornton* is not a true one. If the defendants had established any new relation between themselves and another party, they would not be allowed to interplead, so as to elude the consequences of their own act. But they did not here create any new relation; only having supposed the son to be tenant, they acted accordingly. Justice and convenience alike require an interpleader.

WILLES, J.—I am of the same opinion. The principle of interpleader is, that when two persons are concerned in a dispute, and a third person has that which is to be the fruit of the dispute, and has no part in it, but is willing to give it up according to the result of the dispute, if that third person is sued, he is not obliged to be at the expense or risk of defending the action, but on giving up what is sometimes called "the thing in medio," he is relieved, and the Court directs that the persons, between whom the dispute really exists, should fight it out at their expense. The mere statement of the principle shows its justice. This is clearly a case for an interpleader as to the tenant-right, which is due to one or the other, that is to the claimant or the plaintiff according as the character of the transaction between themselves made the one or the other tenant at the end of the term. Any right which the one has against the other in respect of payment of rent or other admissions, merely affects the question of proof, not the question as to how the dispute originated. The question is, which of the two is entitled to the advantage of the tenancy. Mr. Dixon says that the valuation established a new relation between the defendants and the plaintiff. No doubt, in having that valuation made, the landlords did act as though the plaintiff was their tenant, but that was only to determine the amount, not, who was tenant. The defendants may have assumed that it made no difference to which of the Evans's it was paid. The plaintiff has some evidence against the landlords that he was tenant, and not the father. There is a difficulty in there being a different sort of evidence against the landlords in one case to what there is in the other. Either party may call the landlords at the trial to prove their having treated him as tenant. Has it ever been held that

there should be no interpleader between persons who have different evidence against the persons seeking to interplead? The authorities cited to establish such exception to the law are not cases founded merely on a different class of evidence being produced by the claimant and the plaintiff, but on such evidence establishing such a relation between the defendant and the plaintiff as would make it unjust for an interpleader to be granted. [His Lordship referred to *Crawshay v. Thornton* and *Suart v. Welch* cited above.] The question is, who is the tenant? Two persons each claim to have a right to a sum of money representing the value of the tenant-right. If Mr. Dixon's objection, that the plaintiff's claim is an equitable one, was founded on fact, we should not be competent to give relief. But his argument is founded on a fallacy. Here the son is claiming according to his contract that his entry has made him tenant instead of his father. This is not an equitable agreement. As to the other point, with reference to the valuation and its not applying to or binding the father, the Common Law Procedure Act, 1860, s. 12, enables us to deal with the case whatever difficulty there may have been before under the original Interpleader Act, 1 & 2 Will. 4, c. 58. The justice of the case and established authority both require that this interpleader should be allowed.

KEATING, J., concurred.

* Rule absolute.

* Note.—In the following form :—

"That upon payment of the defendants to the plaintiff the sum of 9*l.* 5*s.* (part of the sum of 194*l.* 7*s.* 2*d.*, the subject matter of this action), together with the plaintiff's costs upon taxation, to the time of the defendants' application for interpleader, and upon the defendants' paying into the hands of the Masters of this Court, within a week, the sum of 185*l.* 2*s.* 2*d.*, the residue of the aforesaid sum of 194*l.* 7*s.* 2*d.*, to abide the further order of this Court, all further proceedings in this cause against the said defendants be stayed, and that the plaintiff and Thomas Evans the elder be restrained from proceeding against the defendants to recover the said sum of 194*l.* 7*s.* 2*d.*, the plaintiff undertaking to abide by such further order as this Court may make after the issue hereinafter-mentioned is disposed of; And that an issue be tried at the next assizes for the county of Derby, in which the said claimant shall be plaintiff, and the said plaintiff in this cause shall be defendant, the question to be tried being, whether the claimant is entitled to the tenant-right as against the plaintiff. The question of costs and all further questions to be reserved until after the trial of the said issue, with liberty to either of the said parties to apply to this Court if dissatisfied with the valuation in the event of the claimant making good his claim to the said tenant-right."

C. P. } CALVERT v. THE SCINDE RAIL-
30, 31 JAN. 1865. } WAY COMPANY.

*Costs, Taxation of—Party a Witness—Travel-
ling and Subsistence—Character at Stake—
Discretion of Master.*

The plaintiff was engaged as engineer to the defendants in India for three years, at 800*l.* a year. During the engagement he was dismissed by the defendants, with three months' notice. Plaintiff demanded a passage home, as under the contract, which the defendants virtually refused. Plaintiff thereupon sued defendants here for wrongful dismissal, and for not providing him with a passage to England, according to contract. Defendants pleaded a justification, on the ground of plaintiff's misconduct. Plaintiff came over to England as a witness, and, owing to delays caused by defendants, was kept a year and a half here for the trial. At the trial plaintiff recovered, by consent, 350*l.* (200*l.* for three months' salary, and 150*l.* for passage to England), and defendants withdrew their plea of justification. Plaintiff's affidavit stated that he could get no employment till the cause was terminated, and that he intended to return to India. The Master allowed the plaintiff on taxation 450*l.* for a year and a half's subsistence in England, and 150*l.* for passage back to India:—

Held, that the allowance was right, but that the Master ought to exercise great caution in such cases.

Lush, Q.C., had obtained a rule, calling upon the plaintiff to show cause why the Master should not be at liberty to review the taxation of the plaintiff's costs in this cause, so far as related to an item of 600*l.* for subsistence and passage money.

The plaintiff was engaged as engineer to the defendants in India for three years, ending the 27th of January, 1862, at 600*l.* a year. Before the expiration of the three years, he was invited by the defendants' agents in India to renew his engagement with the company. He did so; and a second engagement, commencing from the 27th of January, 1862, was made, his salary being raised to 800*l.* a year. This new engagement was confirmed by the defendants. According to the plaintiff, by the contract he was to have his passage back to England paid by the defendants. The plaintiff thereupon removed his family to Lahore in the East Indies, where they still remained. When the plaintiff had served during part of the second period, the defendants' agents in India gave him three months' notice of dismissal; and, on the plaintiff's demand under the contract, undertook to provide him with a passage home to England at the defendants' expense, but they dictated to him the mode of conveyance and the time for his leaving India, and, on his declining to go in that way and at that time, owing to ill health, they peremptorily refused to pay his passage money to England. This was in February, 1863.

The plaintiff then commenced the present action (23rd April, 1863) against the defendants for wrongful dismissal, and for not providing him with a passage to England pursuant to contract, and came over to England as a witness, arriving in November, 1863, after the action was commenced. Notice of trial was given for the sittings after Michaelmas Term, 1863, but the trial was put off from time to time at the instance of the defendants. The defendants put on the record a plea of justification of the dismissal on the ground of the plaintiff's misconduct.

At the trial on the 20th of December, 1864, the defendants consented to a verdict for 350*l.*, representing three months' salary, and 150*l.* for his passage to England, and withdrew the plea of justification. At the taxation of costs the Master allowed to the plaintiff, beyond the general costs of the cause, the sum of 600*l.*, being 450*l.* for a year and a half's subsistence in this country, waiting the trial of this cause, at the rate of 300*l.* per annum (the plaintiff's affidavit stating that he was unable to obtain any employment till the termination of the cause), and 150*l.* for the plaintiff's travelling expenses back to Lahore, whither he deposed on affidavit he was about to return. It was this item of 600*l.* which was objected to by the defendants.

Bovill, Q.C., and Woollett, for the plaintiff, showed cause.

It has been decided that there is no difference between an ordinary witness and a plaintiff who is witness in his own cause as to costs. The plaintiff's actual presence was necessary, as his character was at stake,

Evans v. Watson and Another, 3 C. B. 327;

Cases collected in Gray on Costs, 499;

Dowdell v. The Royal Australian Steam Navigation Company, 3 El. & Bl. 902; 23 L. J. Q. B. 369;

Platt v. Greene, 2 Dowl. 216.

Lush, Q.C., and Sir G. Honyman, for the defendants, in support of the rule, contended that the plaintiff's clear intention was to come home and stay here, otherwise he would not have demanded a passage home. Also that the plaintiff had no right to incur the expense of coming home and staying in England in a case of contract.

Cur. adv. vult.

31 JAN. 1865.

ERLE, C.J., delivered the judgment of the Court (*Erle, C.J., Willes, and Keating, JJ.*), as follows:—

This was a motion to review the taxation of the Master. The plaintiff says that he has been discharged contrary to his contract with the defendants, and brings an action to recover damages for that breach of contract. The jury gave him a quarter's salary, namely, 200*l.* and 150*l.*, for his passage home. It appears that he stayed in this country over twelve months for the trial; and on taxation the Master

allowed him 450*l.* for the time he stayed here, and 150*l.* for his passage back to Lahore. Thus the very large sum of 600*l.* was allowed for one witness. We are much impressed with the caution we are bound to exercise to prevent a party abroad putting a defendant in this country to the risk of so very large a sum. We are clearly of opinion that the allowance is within the principle of the law applicable to this case; but we think it is the bounden duty of the Master to take care that when the charge is so large, no costs are wantonly incurred. Here there was great complaint on the part of the plaintiff of the delay caused by the defendants. As a matter of course, where a party brings an action for a small amount and claims 600*l.* for allowances, the Master should exercise a scrupulous care. I apprehend these costs are allowed in principle by the case of *Reynolds v. Harris* (3 C. B. (N. S.) 267. (See the remarks of Cockburn, C.J., on page 291.) In *Evans v. Watson*, cited in the argument, the same principle is recognised. We have carefully considered the case, and are satisfied that justice is done, but we are anxious to prevent so large a sum being taken as sanctioned and used as a precedent for future occasions.

Rule discharged.

EX. } CHANDLER v. DOULTON and
21 JAN. 1865. } Another.

Excessive Distress—52 Hen. 3, c. 4—*Misdirection.*

The defendants' bailiff having distrained of the goods of the plaintiff to an excessive value above the rent due, and remained in possession of them one week without removing them, though the jury found that the plaintiff had sustained no actual damage:—

Held, that the action for making an excessive distress might be maintained, and nominal damages recovered.

The plaintiff sued the defendant in trespass for an excessive distress.

The cause was tried before Martin, B., in London, at the Sittings after Term.

The material facts are as follows:—

The plaintiff was tenant to the defendants of a mill at Lambeth, and owed the defendants 160*l.* for rent. The defendants' bailiff entered and seized corn in the mill to the value of 260*l.*, and remained in possession of the corn about one week, and on payment of the rent and costs at the end of that time, the bailiff left the premises. The jury found there was no actual damage sustained by the plaintiff from the bailiff remaining in possession, and the Judge thereupon directed them to find a verdict for the defendants, and reserved leave to the plaintiff to move to enter the verdict for 1*l.*, in case the Court decided there was misdirection.

Laxton, on obtaining a rule, cited,
Smith v. Ashforth, 29 L. J. Ex. 259;
Lucas v. Tarleton, 27 L. J. Ex. 246;
Willoughby v. Backhouse, 2 B. & C. 821;
Bayliss v. Fisher, 7 Bing. 153.

James, Q. C. (*Hodgson* with him), now showed cause against the rule.

If you hold there was an excessive distress, it is still necessary to prove actual damage. The jury here found that there was an excessive distress, but no damage resulting therefrom. The words of the Act require that there shall be some damage.

The following cases were cited—

Piggott v. Birtles, 1 M. & W. 441;
Rogers v. Parker, 18 C. B. 112;
Williams v. Mostyn, 4 M. & W. 145.

Laxton, in support, was not called upon.

POLLOCK, C.B.—The report of the Judge at the trial, which must be taken as the true report, shows there was evidence of damage. In the case of *Piggott v. Birtles* (*loc. cit.*), Parke, B., said that the tenant had sustained some damage by the landlord remaining in possession of the goods for a week. In the present case the plaintiff sustained the same damage, which the defendants also admit; and yet the jury found that the plaintiff had not suffered any damage. The rule will, therefore, be made absolute, and the verdict be entered for the plaintiff for 1*l.*

MARTIN, B.—It appears that the defendants distrained on the goods of the plaintiff, and that they made an excessive distress within the meaning of the statute, and that after they had remained in possession for one week, the plaintiff paid the rent. There was clearly therefore an excessive distress. I think I ought to have told the jury, that if they found there was an excessive distress, they were bound to find for the plaintiff, although they might find no actual damage beyond the mere fact of the seizure of the goods, and the broker remaining in possession. The case of *Piggott v. Birtles*, conclusively shows that there must have been damage from seizing the goods of the plaintiff, and remaining in possession. Mr. James says, that if a landlord went into a house, and said, "I seize all the goods in the house for rent due," and immediately after said, "I will confine myself to a reasonable quantity proportionate to the rent," you would have to say that the action would lie, if you do so in this case. But the jury, in that case, would find the act all one, and consider that what the landlord said amounted to nothing. But in this case the broker remained in possession one whole week. There is the same damage here as in *Piggott v. Birtles*.

PROCTER, B.—The jury in this case found there was an excessive distress, it is therefore impossible not to decide in favour of the plaintiff, the damage the

plaintiff has sustained, is the only question. In *Baylis v. Fisher*, the Court were of opinion, that the owner might recover damages, although the plaintiff had the use of the goods all the time; it is merely a question of the degree of damage, in that case it was found to be 15*l.*, in this case it was agreed it should be 1*l.*

Rule absolute.

Ex. } **WHITMORE v. WAKERLEY.**
30 JAN. 1865. }

Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)—
Composition Deed—Omission to Plead.

A composition deed was duly executed and registered by a debtor, under the 192nd and following sections of the Bankruptcy Act, 1861. The deed contained a general release by the creditors. To an action brought against him by a creditor, the debtor had the opportunity of pleading this deed in bar, but did not do so. Judgment was signed by the plaintiff, and the sheriff seized the goods of the debtor under a fi. fa. :—

Held, on motion for a rule calling on the sheriff to give up possession, that the deed being pleadable in bar and not having been pleaded, the defendant could not afterwards avail himself of it to set aside the judgment.

A debtor had duly executed and registered a composition-deed, under the 192nd and following sections of the Bankruptcy Act, 1861, which contained a general release by the creditors. The plaintiff in this case brought an action under the Bills of Exchange Act (the writ in which was issued before the signing of the deed) against the debtor, who made no defence, and did not plead the composition deed in bar. The plaintiff signed judgment, and the sheriff took possession of the debtor's goods under a *fi. fa.* On application being made on behalf of the debtor to Martin, B., at Chambers, for an order calling on the sheriff to give up possession, the learned Judge referred the question to the Court, from whom a rule *nisi* to that effect was obtained.

Hayes, Scrjt., now showed cause.

Quain appeared for the sheriff.

C. Pollock in support of the rule.

A person making arrangements with his creditors is not bound to take notice of any proceedings against him that may be pending, nor can a simple act of laches on the defendant's part entitle the plaintiff to disregard the plain words of the statute, and put in an execution. The words of the 198th section are clear, and to pay the plaintiff now would be giving a fraudulent preference to a creditor who has proceeded with a suit.

He cited,

Clapham v. Atkinson, 4 B. & S. 772.

[MARTIN, B.—It is impossible to allow that a deed,

which is a statutable defence, and might be pleaded in bar, but which a defendant omits so to plead, can afterwards enable him to have a judgment set aside. The common and ordinary rule of practice must govern the present case.]

Per CURIAM.—Our judgment must be in favour of the plaintiff.

Rule discharged with costs.

Ex. } **Re ROBERT EVANS.**
31 JAN. 1865. }

Legacy Duty—Attachment—13 & 14 Vict.
c. 97, s. 8.

A rule absolute for an attachment will be granted, in the first instance, for disobedience to a rule absolute requiring a person to pay moneys received by him for legacy duty.

Crompton Hutton moved for a rule to be made absolute for an attachment in the first instance, under the 13 & 14 Vict. c. 97, s. 8.

Robert Evans had received certain moneys for legacy duty, and had detained the same. An application was made on behalf of the Commissioners of Inland Revenue, to grant a rule requiring him to show cause why he should not deliver an account, upon oath, or why the same should not be paid forthwith, and granted the term before last, and was returnable the first day of this term. No cause was shown against the rule; the rule had been made absolute, and had been served on *Evans*, but not obeyed.

The COURT made the rule absolute in the first instance, with costs.

Rule absolute, with costs.

Ex. Ch. } **GARNETT AND MOSELEY GOLD**
1, 2 FEB. 1865. } **MINING COMPANY v. SUTTON.**

ERROR FROM QUEEN'S BENCH.

Coram—ERLE, C.J., POLLOCK, C.B., WILLES, J., and CHANNELL, B.

Joint-Stock Company—Shareholder—Calls—
7 & 8 Vict. c. 110—19 & 20 Vict. c. 47,
s. 61.

The company was formed under 7 & 8 Vict. c. 110, and was subsequently (with debts and liabilities outstanding) registered as a limited company under 19 & 20 Vict. c. 47 :—

Held, that the liquidators appointed to wind up the company had power, for the purpose of satisfying the debts and liabilities contracted previous to the registration of the company as a limited company, to make a call on an original shareholder, in cases of the amount remaining unpaid on his shares.

This was error from the Queen's Bench on a special case.

The action was brought by the liquidators of the Garnett and Moseley Gold Mining Company (Limited) against the defendant, to recover 2000*l.*, the amount of a call of 1*l.* per share on 2000 shares.

The cause was tried before the Lord Chief Justice at the Surrey Spring Assizes, 1863, when a verdict by consent was taken for the plaintiff for 2,025*l.*, subject to the opinion of the Court on a special case, the most material facts of which are as follows :—

The company was originally formed in the year 1852, under the name of the Garnett and Moseley Gold Mining Company of America, and under the provisions of 7 & 8 Vict. c. 110.

It was declared by the deed of settlement that the capital of the company should consist of the sum of 50,000*l.*, to be divided into 50,000 shares of 1*l.* each.

Upon the 9th of December, 1852, the defendant obtained and accepted an allotment of 2000 shares, and thereupon became liable to pay the company 1*l.* per share in December, 1852, but did not pay it.

Between May and August, 1853, the defendant paid 15,000*l.* on account of those shares, but did not apply for or receive the scrip shares in respect of such payment.

On the 17th of January, 1854, the company was completely registered under 7 & 8 Vict. c. 110. The company was afterwards, upon the 3rd of September, 1856, completely registered, with "limited" liability, under the "Joint Stock Companies Act, 1856."

On the 16th of January, 1861, at an extraordinary general meeting of the company, a special resolution was passed, requiring the company to be voluntarily wound up, and in pursuance of that resolution, liquidators were subsequently appointed for winding up the affairs of the company, and distributing the property thereof.

The liquidators found that there were considerable debts and liabilities of the company, which had been incurred before the registration thereof with limited liability, under the Joint Stock Companies Act, 1856, and also that the available assets of the company were insufficient to satisfy the said debts and liabilities.

The liquidators, therefore, made a call of 1*l.* per share on the defendant and all the other contributories of the company, for the purpose of paying such sums as they deemed necessary to satisfy the debts of the company, &c. The call was payable on the 15th of January, 1863. Due notice was given to the defendant, but he has never paid any portion of such call.

The question for the opinion of the Court is :—

Whether, under all the circumstances, the defendant is liable to pay the amount of the said call, or any part of it.

The Court below having decided in favour of the plaintiffs, on the authority of *Ex parte Stevenson*, 32 L. J. Ch. 97, defendant now brought error.

Holl.—The question is, whether the liquidators of this company have power to make a call on the defendant in excess of the amount remaining unpaid on his shares.

It is submitted that they have no such power.

The 107th and 113th sections of 19 & 20 Vict. c. 47, show that, so far as relates to companies registered under that Act, 7 & 8 Vict. c. 110, is entirely repealed. But to prevent injustice being done to the creditors of companies seeking registration with limited liability under the later Act, the remedies which such creditors before possessed are reserved to them by the 116th section, which provides that the creditors shall be entitled to all such remedies "as they would have been entitled to in case such registration had not taken place." Now the only remedies they had were by action against the company and *sci. fa.* against the individual shareholders, and such remedies they still retain. But a reservation of the remedies of the creditors can have no effect in extending the powers of the liquidators—powers which are especially limited to the 61st section, which provides "that if the company is limited, no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him." That the 61st section applies to a company like the present one cannot be doubted, for the 113th section makes all the provisions of the Act applicable to companies registered under it.

[CHANNELL, B., referred to the 109th section.]

That section is not so wide as the 116th. If the liquidators had power to make calls to an unlimited extent, what would be the use of the reservation in that section? It is only on the supposition that the powers of the liquidators are limited in all cases by the 61st section, that the 116th section becomes necessary.

The 107th and 113th sections show clearly that, as far as related to the winding-up of companies, the policy of the Act was to place unlimited companies, which were subsequently registered with limited liability, exactly on the same footing as companies originally registered as limited under the Act. The winding-up sections of the Act make no distinction between the two classes. The judgment of the Court below is founded entirely on *Ex parte Stevenson* (*suprà*), which cannot be supported.

Garth, for the plaintiffs, was not called upon.

ERLE, C.J.—The question in this case is, whether a shareholder is liable for a certain call made by the liquidators of a company, being voluntarily wound up under 19 & 20 Vict. c. 47. The company of which he is a shareholder was formed under 7 & 8 Vict. c. 110, and was afterwards registered as a limited company under 19 & 20 Vict. c. 47. The defendant objects to pay the call of 1*l.* per share on the 2000 shares allotted to him, on the ground that he has paid up 15*s.* per share, and that therefore a balance of only 5*s.* remains; and that the liquidators by the 61st

section of the 19 & 20 Vict. c. 47, have no power to make a call for a sum exceeding the amount unpaid on the shares held by him. If this is to be taken as a limited company, this call is too much. But before this company was registered as a limited company under the later Act, it had existed as a joint-stock company, and had contracted debts and liabilities, for the discharge of which this call was required. The question is, whether the liability of the defendant, who was a shareholder in the original company, continues in respect of these debts contracted before the registration of the company as a limited company. We are all of opinion that 19 & 20 Vict. c. 47, has saved that liability.

The 107th section of that Act repeals the 7 & 8 Vict. c. 110; but that repeal is qualified by the 109th section, which enacts that no repeal shall affect "any right acquired or liability incurred under any such Acts before such repeal comes into operation." Therefore by this section there is an express saving of the liability under the former Act. It would be a huge injustice if a joint-stock company merely by becoming registered could get rid of their debts. Then comes the 113th section which refers to the registration of companies like the present one, and that section enacts that "All the provisions of this Act shall apply to such company in the same manner in all respects as if it had been originally incorporated under this Act; subject, nevertheless, to the reservations hereinafter contained with respect to the existing rights of creditors and other persons." And those reservations are contained in the 116th section. The intention of the Legislature is perfectly clear to prevent joint-stock companies clearing off their debts, by taking out a certificate of registration. The effect of this Act is to make the company limited *quoad* the debts incurred after registration; but unlimited *quoad* the debts previously contracted. The 61st section, therefore, which limits the power of the liquidators, does not apply, and the judgment of the Court below must be affirmed.

Judgment affirmed.

Ex. Ch. } PUST v. DOWIE.
4 FEB. 1865. }

ERROR FROM QUEEN'S BENCH.

Coram—ERLE, C.J., POLLOCK, C.B., WILLES and KEATING, JJ., MARTIN, CHANNELL, and PIGOTT, BB.

Charter-party—Condition Precedent—Construction of "Weight and Measurement."

By a charter-party made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to "pay for the use and hire of the vessel, in respect of the said voyage 1,550l. in full, on condition of her taking a cargo of not less than 1000 tons of weight and measurement":—

Held, affirming the judgment of the Court below on demurrer, that this was no condition precedent, and that, even if it were so originally, the defendant, having

had a substantial part of the consideration for the promise to pay, could not plead it in bar to the action:

Held, also, affirming the judgment of the Court below on a special case, that the "1000 tons of weight and measurement," meant 1000 tons at a cargo of goods in the ordinary proportions at the port of lading, viz., one-third weight, and two-thirds measurement, and did not refer to a cargo for the Sydney market, in which the proportions were different.

Error was brought, by the defendant, to reverse two judgments of the Court of Queen's Bench in favour of the plaintiff, one on demurrer, and the second on a special case. The proceedings on demurrer are reported in 32 L. J. Q. B. 179; and on the special case, in 3 N. R. 509; s. c. 33 L. J. Q. B. 172. In those reports are fully set out the facts and the pleadings, which as far as material in the present instance, were as follows:—

The declaration set out a charter-party made between the plaintiff, master of a vessel called the "Der West;" and the defendant, as freighter or charterer of the same. This charter-party contained a covenant on the part of the defendant that he "*should and would pay for the use and hire of the said vessel, in respect of the said voyage, the sum of 1,550l., in full, on condition of her taking a cargo of not less than 1000 tons of weight and measurement;*" and the declaration alleged two breaches,—viz., default in loading, and non-payment of the balance of the sum of 1,550l., over and above the freight payable abroad as per bills of lading, in pursuance of the terms of the charter-party.

The defendant's third plea was, as to the non-payment of the balance, that the ship did not nor could take a cargo of not less than 1,000 tons of weight and measurement, but only a much less cargo.

To this plea the plaintiff demurred, on the ground that it was not a condition precedent to the payment of the 1,550l. that the ship should carry 1000 tons of weight and measurement: and the Court held that even if it were originally a condition precedent, the defendant could not plead it in bar, having had a substantial part of the consideration for the promise to pay. But it was said that the breach of the condition (if breach there were) might be an answer *pro tanto* in reduction of damages.

The vessel was chartered for a voyage from Liverpool to Sydney; and it was shown in evidence at the trial, that in ordinary cases two-thirds of the cargo are measurement goods, and one-third weight; but that a Sydney cargo is two-thirds weight and one-third measurement. Of an ordinary cargo the vessel could contain 1000 tons, but of a Sydney cargo not more than 800. It was contended on behalf of the defendant that the charter-party being for a voyage to Sydney, the plaintiff must be held to have contracted that his vessel should carry 1000 tons of a Sydney cargo. The learned Judge, however, was of opinion that the contract was for an ordinary cargo,

and the jury found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for himself. A rule was obtained accordingly, but was discharged by the Court of Queen's Bench.

The two points on the demurrer and the special case were now argued together (by leave of the Court) by

Bayliss (Edward James, Q.C., with him), for the plaintiff in error (the defendant below).

The question for the consideration of the Court, on the special case, is, What cargo was the charterer to put on board? When a charterer contracts for a cargo to be taken to a particular port, the charter-party, if silent as to the kind of cargo, has reference to the place to which the goods are to be taken: in this case, therefore, the cargo was to be a Sydney cargo.

If that is so, we come to the question raised by the demurrer. That the ship should take 1000 tons of weight and measurement (impliedly a Sydney cargo), was a condition precedent to the payment of any part of the balance of freight. This condition was broken, and the plaintiff below, whatever might be the case on a "quantum meruit," had no right to recover on the charter-party. There has been no partial benefit in this case to deprive the condition of its character as a condition precedent, and bring it within the rule laid down by Williams, J., in

Behn v. Burness, 3 B. & S. 751.

[ERLE, C.J.—In that case the learned Judge said, with his usual clearness, "If the party has received any substantial part of the consideration," &c. Now, surely, when the owner has placed his vessel at the disposition of the charterer, and done all that that implies, there has been enough work and service done, and loss sustained by him to entitle him to say that the charterer has received a substantial part of the consideration. Then the condition becomes, in the words of Williams, J., in *Behn v. Burness*, a warranty in the narrower sense of the word.]

He cited,

Moorsom v. Page, 4 Camp. 103;

Cockburn v. Alexander, 6 C. B. 791;

MacLachlan on the Law of Merchant Shipping, 378;

Stadhard v. Lee (per Cockburn, C.J.) 3 B. & S. 364, 370;

Tidey v. Mollett, 12 W. R. 802;

Graves v. Legg, 9 Exch. 709;

Guthbert v. Cumming, 11 Exch. 405; 24 L. J. Exch. 310.

Mellish, Q.C. (*Kemplay* with him), for the defendant, in error (the plaintiff below), was not called on.

ERLE, C.J.—We are all of opinion that the judgments of the Court below, both on the demurrer and the special case, must be affirmed. The argument before us has turned on the stipulation in the charter-party, for the pre-payment by the defendant of the sum of 1,550*l.*, on condition of the ship's taking a cargo of not less than 1000 tons of weight and measurement. This action was brought for the balance of that sum, and the defence was, that the condition was not performed. The defendant says that the meaning of the condition was, that the ship should carry 1000 tons of a Sydney cargo; now a Sydney cargo is unusual in this respect, that, owing to the peculiar nature of the Sydney market, it consists of two-thirds weight and one-third measurement goods; whereas, in ordinary cases, and at the port of lading, one-third of the cargo is weight and two-thirds measurement. And the defendant has appealed to this Court on the question, whether the stipulation in the charter-party was for a Sydney cargo. We think that it was not so. The natural construction to be placed on that stipulation is, that the vessel should be capable of taking an ordinary cargo of 1000 tons' weight and measurement; ordinary, that is, at the port of lading. It appears that she was capable of taking such a cargo; there has therefore been no breach of the condition, and the defendant is not entitled to succeed on this appeal.

As to the question raised by the demurrer, we are all of opinion that the condition, that the ship should carry 1000 tons, is not in the nature of a condition precedent; and then, even were it so originally, it comes within the principle laid down by Williams, J., in *Behn v. Burness*, the defendant having received part of the consideration, and therefore part of the benefit of the contract.

Judgments affirmed.

EQUITY.

Lord Chancellor. }
 18 TO 25 NOV. 1864. } SIMPSON v. HOLLIDAY.
 14 JAN., 9 FEB. 1865. }

Patent—Construction of Specification.

The rules applicable to the construction of patents are the ordinary rules for the interpretation of written instruments; and the only errors which will not vitiate a patent are those which appear on the face of the specification, or the drawings it refers to, or which would be at once corrected in following out the instructions given for the process or manufacture.

This was a suit instituted by the assignees of a patent granted to Henry Medlock, in 1860, for improvements in the preparation of red and purple dyes, in order to restrain the defendants from infringing the same, so far as it related to the red dyes.

The descriptive portion of the specification was as follows:—

"I mix aniline with dry arsenic acid, and allow the mixture to stand for some time, or I accelerate the operation by heating it to or near to its boiling point, until it assumes a rich purple colour, and I then mix it with boiling water and allow the mixture to cool. When cold it is filtered or decanted. The aqueous solution which passes through the filter contains a red colouring matter, or dye, while a tarry substance remains on the filter. This tarry substance, dissolved in alcohol, methylated spirit, or other suitable spirit, furnishes a purple dye. These solutions of colouring matter may be used at once in the process of dyeing, concentrated or diluted according to the tints required. The mixture of aniline and arsenic acid, after being heated, may be allowed to cool, and then forms a paste, which may be preserved. When required for use, it is mixed with boiling water, and treated as above described. I have found that the proportion of two parts by weight of aniline to one part by weight of arsenic acid yields a good result, but I do not confine myself to that proportion, as it admits of variation. Having now described the nature of my said invention, and in what manner the same is to be performed, I wish it to be understood that what I claim is the manufacture or preparation of red and purple dyes, by treating aniline with arsenic acid as hereinbefore described."

The suit came on before Vice-Chancellor Wood, on the 8th of June, 1864, and the following days, for the trial by him, without a jury, of certain issues of fact, as to first, the novelty of the invention; secondly, whether Medlock was the first inventor; thirdly, the sufficiency of the specification; fourthly, the utility of

the invention; and fifthly, infringement; and on the 15th of July, the Vice-Chancellor found in favour of the plaintiffs on all the issues. From this decision the defendant appealed.

Two main objections were taken to the validity of the specification. First: It was contended that the specification described two processes for obtaining the red colour—one without, the other with, the action of heat. It was admitted by the plaintiffs that no beneficial result could be obtained without applying heat. Secondly. It was contended that by the term dry arsenic acid, Medlock must be taken to have meant anhydrous arsenic acid. It was admitted by the plaintiffs that no beneficial result could be obtained unless the arsenic acid contained a considerable percentage of water.

Sir F. Kelly, Q.C., Grove, Q.C., Bovill, Q.C., Sir Hugh Cairns, Q.C., Giffard, Q.C., J. A. Russell, and Drewry, for the plaintiffs.

Roll, Q.C., Hindmarch, Q.C., Day, and Bevir, for the defendants.

14 JAN. 1865.

THE LORD CHANCELLOR said: This case depends entirely on the construction and truth of the specification of the patent. The first objection raised by the defendants is that two processes for effecting the end proposed, one of which may be called the cold, and the other the hot, process, are described in the specification, but that one of them, namely, the cold process, is ineffective. The plaintiff denies that two separate processes are described, if the specification be construed, as he contends it ought to be, in the manner most favourable to the patentee; but if there are two distinct processes described, yet as the specification states in effect that the desired result is obtained more quickly by the hot process, no one (as the plaintiff contends) would think of using the cold process, or be misled by it; and he further contends that any workman of ordinary knowledge and observation would reject the cold process and adopt the hot. At the same time, the plaintiff admits that the cold process will not succeed, and is of no utility. If, therefore, the true construction of the specification be, that two distinct processes are described as being both efficient, and are both claimed as part of the invention, but one is found upon trial to be inefficient and useless, it is plain that the patent has been granted on a false suggestion, and is, therefore, invalid and bad at law.

I cannot clearly discover from the shorthand writer's note of the Vice-Chancellor's judgment what

were the grounds of his Honour's decision on this objection. If his Honour thought, of which there appears some indication, that the description of the cold process would do no harm, because the other process is described as quicker, and, therefore, that as no one would be likely to resort to the cold process, the mention of it was harmless, and would not mislead, I cannot concur in any such legal conclusion. If a specification alleges that a particular process, which may be slow, troublesome, and expensive, is efficient, and the statement is untrue, the vice is not removed by the fact that the same specification also describes another process which is efficient, and which is stated to be speedy, certain, and economical. When it is said that an error in a specification, which any workman of ordinary skill and experience would perceive and correct, will not vitiate a patent, it must be understood of errors which appear on the face of the specification, or the drawings it refers to, or which would be at once discovered and corrected in following out the instructions given for any process or manufacture; and the reason is, because such errors cannot possibly mislead. But that proposition is not a correct statement of the law, if applied to errors which are discoverable only by experiment and further inquiry. Neither is the proposition true of any erroneous statement in a specification amounting to a false suggestion, even though the error would be at once observed by a workman possessed of ordinary knowledge of the subject. For example, if a specification describes several processes, or several combinations of machinery, and affirms that each will produce a certain result, which is the object of the patent, and some one of the processes or combinations is wholly inefficient and useless, the patent will be bad, although the mistake committed by the patentee may be such as would be at once observed by an ordinary workman. I am of course speaking of cases where that process or machine, which is inefficient, is the invention, or part of the invention that is claimed.

With respect to the rules that govern the construction of specifications, they are the ordinary rules for the interpretation of written instruments, having regard specially to the fact that the specification must clearly fulfil the obligation imposed on the patentee by the proviso contained in all letters patent, namely, that the grant shall be void if the patentee shall not particularly describe and ascertain the nature of his invention, and in what manner the same is to be performed. It has, therefore, become a settled rule, that the specification must be so expressed as to be perfectly intelligible to a workman of ordinary knowledge, and it must follow that if there be any obscurity or ambiguity in the specification, which is likely to mislead, this defect ought not to be helped by any refined or secondary interpretation of the language.

It was contended before me, and the Vice-Chan-

cellor* is reported to have said, that "it has been settled by authority, that the most liberal construction is to be given to a patent that will sustain it, especially in those cases where the Court is satisfied that the invention is really new and useful." If the words, "the most liberal construction," are intended to denote some principle of interpretation different from the ordinary rules for the construction of written instruments, I am not aware of any such authority. The Vice-Chancellor is made to say, that this liberal construction is especially adopted in cases where the Court is satisfied that the invention is really new and useful, but novelty and utility are necessary for the validity of every patent. There is probably some inaccuracy in the note of the judgment. I concur in the remarks made by Mr. Baron Parke, in his charge to the jury, in the case of *Neilson v. Harford* (8 M. & W. 806), in these words: "Within the last ten years or more, the Courts have not been so strict in taking objections to specifications, and they have endeavoured to hold a fair hand between the patentee and the public—willing to give the patentee, on his part, the reward of a valuable patent; but taking care to secure to the public, on the other hand, the benefit of that proviso which is introduced into the patent for their advantage."

Coming now to the construction of this specification, the inquiry is, whether, according to the ordinary rules of interpretation, there is a distinct statement of two separate processes, which are both claimed as inventions. The question depends on the construction of the first sentence in the specification; and the inquiry seems to be, whether the words, "until it assumes a rich purple colour," apply to both the antecedent members of the sentence, so as to involve a statement, that, if the mixture of aniline with dry arsenic acid be allowed to stand for some time, without the application of heat, it will assume a rich purple colour; but that the operation—that is, the obtaining a rich purple colour—may be accelerated by heat. And I am unable to manage the words in any way, so as to arrive at a different interpretation. It seems impossible, without rejecting several words, and altering the form of the whole sentence, to make it descriptive of one process only—namely, that in which the operation is accelerated by heating the mixture.

Two modes of treating aniline with arsenic acid are plainly indicated—one, the cold and slower process; and the other, by the application of a very considerable degree of heat, so as to bring the mixture to, or near to, the boiling point of aniline. Both these processes enter into and form the claim of the patentee, which is for the manufacture or preparation of red and purple dyes, by treating aniline with arsenic acid, in the

* It is proper to mention that, in giving judgment in *Benard v. Levinstein*, 26 Jan., the Vice-Chancellor disclaimed the use of these words, in the sense attributed to them by the Lord Chancellor.

manner hereinbefore described—that is, either by the cold or the hot process.

It was argued before me, that the word “or,” in the words, “or I accelerate the operation,” should be read “and,” a construction which is forbidden by the whole structure of the sentence. And it was further contended, that the subsequent sentence, which begins with the words, “The mixture of aniline and arsenic acid, after being heated,” proved that one process only—namely, the hot process—was intended to be described and used; and that it corrected the alternative form of expression in the first sentence. But this is not the case, for the sentence in question applies only to the paste which is formed by the hot process, if the mixture, after being heated as directed, is allowed to cool before it is treated with hot water in the manner described.

It was argued that every person well informed on the subject would see that the cold process was ineffective. But this is to correct the specification by the superior intelligence of the reader, and is a mode of proving the invalidity of the patent by showing the false suggestion on which it was granted. It was frankly and rightly admitted by the plaintiff's counsel during the argument before the Vice-Chancellor and also before me, that if the specification contained a separate and distinct description of a cold process as well as of a hot process, the patent must be held to be void, because the cold process would not succeed; and as I am clearly of opinion that there is a description and claim of these two processes in the specification as constituting the invention, I am obliged to pronounce the patent invalid.

Although my decision rests on the ground I have stated, yet, as the case may be carried to the House of Lords, it would be wrong to omit all notice of the other objection of the defendant, and which in fact formed the principal subject of evidence and argument. This objection is founded on the direction contained in the specification to take “dry arsenic acid.” “Dry,” says the defendant, “is synonymous with anhydrous.” The one is the popular, the other the chemical equivalent term. All arsenic acid, according to the formulæ for its preparation, contained in different pharmacopœiæ, is anhydrous, but in fact it is seldom, if ever, so prepared as to cease to be to a certain extent hydrated. According to the most accurate experiments of the French chemist Kopp, whose work was given in evidence, it would seem that arsenic acid if heated to a red heat throws off all its water of hydration, but at the same time becomes an arseniate, and ceases to be an acid. According to the degree of heat to which it is subjected it retains more or less of water of hydration. From the evidence it would seem that arsenic acid, as an article of commerce, at the time when this patent was granted, was usually so prepared as that when sold it was found to contain from twelve to fifteen or sixteen per cent. of water of hydration, and the defendants insist that the patentee

must be considered to have known this fact, and therefore to have used the adjective “dry” to denote that it must be “anhydrous” in a greater degree than was usually the case with arsenic acid of commerce.

It further appears from the evidence that no good result could be obtained from using, in the manner directed by the patent, arsenic acid that contained less than twelve or fourteen per cent. of water of hydration, but there is some evidence to show that with that quantity of water of hydration a beneficial result would be obtained. The defendants, therefore, insist that the effect of the direction to take dry arsenic acid would naturally be to mislead the workman using the patent, and induce him to believe that the imperfect results obtained from the ordinary arsenic acid were attributable to its not being sufficiently anhydrous, and thus he would be led away in a direction opposite to that in which the true practical discovery lies, and which is probably embodied in the subsequent patent of De Laire and Girard, granted in 1860. On the contrary, the plaintiffs insist that “dry arsenic acid” was at the time of the patent the well-known denomination of commercial arsenic acid, which means that it was commonly bought and sold under that name. The Vice-Chancellor appears to have been of this opinion, but I cannot find any evidence that arsenic acid was at the time of the patent ever labelled, sold, or invoiced under the name of “dry arsenic acid.” On the contrary there is some evidence that if the article had been asked for under the name of dry arsenic acid, the seller would not have undertaken to sell it as answering that description.

Upon a review of the arguments and the evidence, I cannot on this point accept the contention of either side. “Dry” is not synonymous with “anhydrous.” When used in its ordinary sense as opposed to “wet,” it means physically dry, or dry to the touch, and many things are dry superficially to the touch, which contain a great deal of water of combination. Now it is a property of arsenic acid, that it readily imbibes moisture from the atmosphere, and becomes deliquescent. But when in a state of deliquescence, it is moist and clammy to the touch, and would not be solid or physically dry. In putting a construction, therefore, on this part of the specification, I do not attribute to the word “dry” the technical scientific meaning of anhydrous; but take it in its ordinary and popular meaning of dry to the touch, or dry externally, and which makes the passage amount to a direction to take the powder of the arsenic acid in a solid or physically dry condition, and not in a state of deliquescence. The plaintiff Nicholson states in his evidence, that the word “Dry” was used in order that the proper proportion of acid might be more readily ascertained, and he, therefore, construes the words as meaning physically dry. It is true that the direction resulting from this construction of the word “dry,” will be of no use, but rather the contrary, in the profitable working of the invention; but inasmuch as

I have already found it proved that the ordinary arsenic acid of commerce when used in a state of a dry powder, in which it was and is commonly sold, would produce a beneficial result; this addition of the word "dry" would not affect the working of the patent. I should not, therefore, have been of opinion that this objection was fatal to the patent; but the other objection I hold to be fatal.

I must, therefore, reverse the order of the Vice-Chancellor, and with some reluctance pronounce the patent to be bad and void in law.

Cases of this nature frequently give rise to complaints of the state of the law. It is, therefore, right to point out how entirely the plaintiff's failure has arisen from not availing himself of the salutary provisions of the existing statutes. The provisional specification proves that a valuable discovery had been partially made, but not matured; and that the true conditions on which it might become an invention of practical utility, had not been ascertained. Six months are allowed by the law for maturing the invention, and accurately ascertaining and stating it; but in this case there does not appear to have been any attempt by the patentee to improve his knowledge, for the complete specification is a mere repetition of the provisional. Lastly, the inefficiency of the cold process, and the dangerous language of the specification, must have been known long prior to this suit, and yet there was no attempt to remove the objection, as might easily have been done by a disclaimer under the statutes.

Reverse the order of the Vice-Chancellor, dissolve the injunction, declare that this Court doth find and determine that the patent is bad and void in law, let the costs before the Vice-Chancellor and of this hearing be costs in the cause, let the cause be transferred from the Vice-Chancellor's paper to me, and be heard before me on all that remains to be disposed of on the first day of my sitting after the present Term.

Sir P. Kelly asked, whether his Lordship would dispose of the particular issues.

THE LORD CHANCELLOR said, he was sorry to find that so cumbersome and inconvenient a practice had been introduced into this Court; he would very much have preferred a practice, which, with the experience of five or six cases of great weight, had uniformly been found to be the only thing required, namely, first to determine the validity of the specification. It was quite idle to go into the issues of novelty and infringement, when it had been determined that the patent was bad at law, and there was, therefore, nothing to infringe. He had made the order in the present form in order that it might more easily be carried to the House of Lords, if an appeal was desired; in which case the further hearing of the cause would be suspended.

9 FEB. 1865.

The cause coming on for hearing this day, his Lord-

ship refused, as he had done before, to express any opinion on the issues, other than that relating to the sufficiency of the patent; and ultimately made an order according to the following

Minute.—Reverse the order of the Vice-Chancellor. Declare the patent to be void at law. Dismiss the bill without costs.

Lord Chancellor. } *Ex parte KEMPSON.*
7 DEC. 1864, 11 FEB. 1865. } *Re BARKER.*

Bankruptcy — Contingent Debt — Unliquidated Damages—Bankruptcy Act, 1849, ss. 177, 178—Bankruptcy Act, 1861, s. 153.

A broker contracted for the purchase of iron, to be delivered and paid for on a future day, and he did not disclose the name of his principal. Before the day fixed for delivery, the principal became bankrupt, and the assignees declined to accept the contract. Thereupon, but still before the day fixed for delivery, the broker sold the iron in a falling market, and claimed to prove for the difference:—

Held, that the proof was not admissible.

The bankrupts, for some time before their bankruptcy, dealt largely in the purchase and sale of iron, and for the purpose of this dealing they employed Messrs. Walduck, who were iron brokers at Liverpool.

By the custom of the trade the broker, in buying does not disclose the name of his principal.

At the time of the adjudication the brokers had, under orders from the bankrupts, entered into contracts for the purchase of iron to the amount of 67,000*l.*, to be delivered and paid for at a day which was after the adjudication.

The iron was in the possession of the seller ready for delivery, but as the assignees did not accept the contracts, the brokers, after the adjudication, and very shortly before the day fixed for delivery and payment, resold the iron in a falling market, at prices amounting to the clear sum of 57,523*l.* 8*s.* 10*d.*, and having paid the difference to the seller, claimed to prove the balance, amounting, with charges, to the sum of 9,476*l.* 11*s.* 2*d.*

The proof was admitted by the Commissioner as coming within the 178th section of the Bankruptcy Consolidation Act, 1849.

Against this decision the assignees appealed.

Bacon, Q.C., Field, Q.C., and De Gex, for the assignees.

The contract made by the bankrupt was to find money for the brokers when the day of payment should come. The iron was resold by the brokers before the day of payment arrived; therefore, the contingency on which the bankrupt was to become liable never happened, and there can be no proof under section 178 of the Act of 1849. At the time of the adju-

dication there was no debt due from the bankrupt to Messrs. Walduck; there existed only a contract, for the breach of which the remedy lay in damages. The principle of

Boorman v. Nash, 9 B. & C. 145,

is applicable here,—viz., that there can be no proof where, at the time of adjudication, it is uncertain, not only what amount of damages, but whether any damage, will be sustained. The same principle has been followed in

Re Gales, De G. 100;

Maples v. Pepper, 18 C. B. 177;

Boyd v. Robins, 5 C. B. (N. S.) 597.

Neither is the claim sustainable under section 173 of the same Act,

Macdougall v. Paton, 8 Taunt. 584;

nor under section 153 of the Act of 1861,

Ex parte Mendel, Re Moor, 1 De G. J. & S. 330; s. c. 3 N. R. 546.

Daniel, Q. C., and *Little*, for Messrs. Walduck.

The contract made by the brokers with the bankrupts was that the brokers should have the right to perform the contract made between themselves, and the seller. In performing this contract, they paid money for the use of the bankrupt; for that money they now claim. The bankrupts incurred a liability to abide by the consequences of a contract completed before the adjudication. That liability might have extended to the whole price of the iron; but it was capable of reduction, and has been reduced. The claim is, therefore, admissible under section 178 of the Act of 1849.

But if the claim be not admissible under section 178, it certainly is under section 173. The money to be paid by the brokers to the seller, was in reality the debt of the principal; the brokers have paid that debt, and they are entitled to prove for it.

Field, Q. C., in reply.

As to the claim falling under section 173, that is disposed of by,

Macdougall v. Paton (*loc. cit.*).

As to section 178, it may be shown that the claim fulfils none of the requirements of that section.

1st. There was no liability contracted before the adjudication. No action could have been maintained on the contract at that time.

2nd. The liability (if any) was to pay not money but damages. The contract was to take the iron and pay for it if taken; if the iron was not taken, the vendor might sell it in the market, and claim the difference, which would be the amount of damage.

3rd. According to the statute, the liability must be to pay money on a contingency; but according to the argument on the other side, the liability was absolute.

4th. The proof is allowed only on the contingency happening; but here the contingency, if any, has not happened.

11 FEB. 1865.

THE LORD CHANCELLOR said that section 178 of the Bankrupt Act, 1849, referred to engagements upon a future contingent event. The contingency must either expressly or by implication, enter into and be part of the contract.

In the present case, there was nothing of the kind. Immediately on the making of the contracts, the brokers became bound to the sellers to pay them the price at the time named for completion. The bankrupts were bound to the brokers to find them the means of doing so. The bankrupts, therefore, had at the time of adjudication, contracted a liability to the brokers at a future day; but it was not a liability upon a contingency, namely, an uncertain event.

It had been held, that if a surety covenanted with the creditor, that if the debtor failed to pay, he, the surety, would pay the debt on demand, there was a liability upon a contingency, it being uncertain whether the principal debtor would pay or not.

In the present case there was no liability of the bankrupts to the seller; the brokers were bound to the seller to pay the price, and the bankrupts were bound to the brokers to find the money to enable them to do so; and the contract was definite to accept and pay for the goods at a certain time, before which bankruptcy intervened.

He was of opinion, therefore, that there was no contingency within the meaning of that word in the 178th section of the Bankrupt Act, 1849, and that the claim of Messrs. Walduck was not proveable under that section.

He was also of opinion, that the claim was not proveable under the 177th section of the same Act, because at the time of the adjudication, the bankrupts had not contracted with the brokers any contingent debt; and he was further of opinion, that no proof could be made under the 153rd section of the Bankruptcy Act, 1861, because at the time of the adjudication, the bankrupts were not liable by reason of the contract to any demand by the brokers for damages, or in the nature of damages. Such demand did not arise until after the bankruptcy.

The order must be reversed, and the proof expunged.

Lord Chancellor.

20, 23 JAN., 11 FEB. 1865. } ROBSON v. FLIGHT.

Trust—Power in Nature of Trust—Execution by Stranger—Acquiescence—Purchase for Value without Notice.

A testator devised real estate to trustees upon certain trusts: and he directed that the estate should, and might be leased by the trustees, and the survivor of them, and the executors or administrators of such survivor.

One of the trustees died in the lifetime of the testator, and the other disclaimed: and the heir-at-law of the

testator, who was tenant for life of a moiety of the estate, granted a lease, purporting to be in execution of the power:—

Held, that the lease was not binding on the remainderman:

Held also, that acceptance of rent by the remainderman, was not a confirmation of the lease.

The lease had been purchased under the usual condition, not to inquire into the lessor's title:—

Held, that the purchaser could not maintain the defence of purchase for value without notice.

This was an appeal by the plaintiffs from a decision of the Master of the Rolls, reported, *ante*, p. 154, where the facts and arguments are fully stated.

Southgate, Q. C., and *Bagshawe*, for the plaintiffs.

Selwyn, Q. C., and *Hemming*, for the defendant Flight.

Woodroffe, for the defendant Cannon.

11 Feb. 1865.

THE LORD CHANCELLOR said,—Where lands are devised to trustees in fee upon trusts, or with powers which, in their execution, require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will. The reason is obvious. Such trusts and powers are supposed to have been committed by the testator to the trustees he appoints, by reason of his personal confidence in their discretion; and it would be wrong to permit them to be exercised by the heir-at-law, who may be a person unknown to the testator, or in whom he has no confidence at all. A trust which gives the trustee no other duty to discharge, than simply to clothe the equitable ownership with the legal estate, may, indeed, be performed by the heir. It does not follow that a trust may be performed, or a trust power exercised, by the heir-at-law, because it is obligatory on the trustees of the will. It depends on the question, whether, in the exercise, anything has to be supplied by the judgment and discretion of the power, acting in the exercise of such trust or power.

In the present case, the Master of the Rolls has treated the proviso as to granting leases contained in the will as if it were a bare trust, and not a trust power requiring discretion in its exercise. But in the execution of the duty of granting leases much judgment is required to be exercised. The fitness and responsibility of the lessee, the adequacy of the rent, the length of term to be granted under the circumstances, and the nature of the covenants, stipulations, and conditions which the lease should contain, are all matters requiring knowledge and prudence.

The power to lease may be a trust-power in the sense of its being the duty of a trustee to avail himself of it under proper circumstances; but it is to be exercised

by a person selected for the purpose, and not by the individual on whom, by reason of intestacy, the law casts the estate.

I am, therefore, of opinion that the lease in question, which must be taken as intended to be granted under the power, is void, as having been granted by a stranger to the power.

There is no authority to warrant my holding, either that acceptance of rent by the adult plaintiff, since her majority in the year 1860, is a confirmation of the lease, or a bar to her obtaining relief in this suit.

An attempt is made by the defendant, the assignee of the lease, to set up the defence of a purchaser for valuable consideration without notice; but, as he bought under an engagement not to call for the lessor's title, he must have imputed to him the knowledge which, on prudent inquiry, he would have immediately obtained.

Therefore the decree of the Master of the Rolls must be reversed; and it must be declared that the lease is to be taken as intended to be granted under the power of leasing contained in the will, but that such power was not vested in, and could not be exercised by John Ebdell Hall, the heir-at-law of the testator; and that such lease is, therefore, void, and ought to be delivered up to be cancelled; and the same must be decreed accordingly, but without prejudice to any other tenancy or right of occupation of the premises to which the defendant may be entitled.

Lord Chancellor. } WESTON v. COLLINS.
24, 25 JAN. 11 FEB. 1865. }

Lease—Purchasing Clause—Construction.

An indenture of lease provided that if the lessee should be desirous, at the expiration of the term, of purchasing the inheritance, and should give, &c., six months' notice of his desire, and should pay to the lessor, his heirs, &c., 2000*l.*, and all arrears of rent, the lessor would assure the inheritance to the lessee. The lessee was bound to accept the lessor's title, and he gave, what under the circumstances, amounted to a good notice of his desire to purchase, but through the lessor's neglect, as he alleged, was unable to have a conveyance prepared by the expiration of the term. On the day of the expiration of the term he paid all arrears of rent, but did not pay the 2000*l.*:—

Held, that the payment of this sum was a condition precedent to any contract arising binding upon the lessor, and that therefore a bill for specific performance could not be maintained against him.

By an indenture, dated the 9th of September, 1842, made between the defendant of the first part, and Henry Smithers and Thomas Isaacson of the second part, certain hereditaments in Brighton, partly freehold, and partly copyhold, were demised to Henry Smithers and Thomas Isaacson, their executors, &c., for the term of twenty-one years from the 29th of September, 1842, at the rent thereby reserved, and

subject to the covenants therein contained. Such indenture contained a covenant on the part of the defendant in the following words—

"That if the said Henry Smithers and Thomas Isaacson, their executors, administrators, or assigns, shall be desirous at the expiration of the said term of purchasing the inheritance in fee simple of and in such portion of the said messuage or tenement, hereditaments, and premises as is freehold, and the copyhold inheritance, subject to a stinted fine and heriot of 6*d.* each, of and in such part thereof as is copyhold, and shall give unto or leave at the last known or most usual place of abode of the said James Collins, his heirs, or assigns in England, six calendar months' notice in writing of such his or their desire, and shall pay unto the said James Collins, his heirs, or assigns, the sum of 2000*l.* sterling, as and for the purchase thereof, and also all arrears of the rent hereinbefore reserved, he the said James Collins, his heirs, or assigns, will, at the expense of the said Henry Smithers and Thomas Isaacson, their executors, administrators, and assigns, sell, convey, and surrender the said messuage or dwelling-house, buildings, and premises to the said Henry Smithers and Thomas Isaacson in fee simple, as to the freehold part, and the customary inheritance of the copyhold part subject as aforesaid, free from incumbrances; and the expense of preparing an abstract of the title of the said James Collins to the said premises, and charges incidental thereto, and of any copies of deeds or other documents and certificates, and all assignments of outstanding terms (if any) that may be required to verify the same, and also the charges of the solicitor of the said James Collins, his heirs, or assigns, for perusing and procuring the execution of the said conveyance, and the taking of such surrender, and the charges incidental thereto are to be borne and paid by the said Henry Smithers and Thomas Isaacson, their executors, administrators, and assigns, it being understood and agreed that the said James Collins, his heirs, or assigns, are to be put to no expense in relation to the title to, or conveyance or transfer of, the said hereditaments and premises, and the said Henry Smithers and Thomas Isaacson do hereby for themselves, their executors, administrators, and assigns, expressly accept and approve the title of the said James Collins thereto."

The plaintiff having acquired all the interest of the lessees under this indenture, served the defendant with notice of his intention to purchase. The defendant alleged that such notice was not in conformity with the terms of the lease; but the Court held that any irregularity in this respect had, under the circumstances of the case, been waived by the defendant's subsequent conduct.

After a considerable correspondence between the solicitors of the parties, the defendant's solicitors served the plaintiff and his solicitors with the following notice:

"To MR. THOMAS RICHARD WESTON, and to MR. WILLIAM CHAMBERLAIN, his Solicitor.

"Take notice that Mr. James Collins, formerly of Brighton, in the county of Sussex, Merchant, but now of Paris, in the kingdom of France, will attend at No. 8, Ship Street, Brighton aforesaid, the offices of his solicitors, Messrs. Attree, Clarke & Howlett, on Tuesday, the 29th day of September instant, at the hour of 12 o'clock at noon, for the purpose of the said Thomas Richard Weston (who claims to have had assigned to him the indenture of lease dated the 9th day of September, 1842, made between the said James Collins of the one part, and Henry Smithers and Thomas Isaacson of the other part,) paying to him, the said James Collins, the sum of 2000*l.*, as the purchase-money for the messuage and hereditaments demised by the said lease, and now known as the 'Feathers Hotel,' in Brighton aforesaid, and the rent then due for the same. And further take notice, that the said Thomas Richard Weston will be required at the same time to produce the original lease and the assignment thereof. And further take notice, that if the said purchase-money and rent are not paid at the place and time before-mentioned, the said James Collins will decline and refuse to permit the said Thomas Richard Weston to become the purchaser of the said hereditaments.

"Dated the 21st day of September, 1863.

"ATTREE, CLARKE, & HOWLETT,

"No. 8, Ship Street, Brighton,

"Solicitors to the said James Collins."

The defendant accordingly attended to receive the 2000*l.*, but the plaintiff did not pay it. The plaintiff alleged that, by reason of the defendant's delay in delivering a proper abstract, and in answering his requisitions, he was unable to have a conveyance prepared by the 29th of September, and insisted that he was still entitled to have the covenant in the lease performed on paying the 2000*l.* and legal interest. Some negotiations for carrying out the purchase had been entered into, but they had proved unsuccessful.

The Master of the Rolls made a decree for specific performance according to the prayer of the bill. The defendant now appealed.

Selwyn, Q. C., and *Bilton*, for the plaintiff.

The defendant insists that as the money was not paid punctually on the 29th of September, he is under no obligation to sell. But time is not of the essence of the contract, and even if it originally were, the plaintiff was not bound to pay the money at a time when, owing to the defendant's default, he was unable to have a conveyance ready. The plaintiff, it is true, cannot object to the defendant's title, but he is still entitled to draw his conveyance so as to give him the utmost extent of the right which the defendant has, and this, through the defendant's neglect to deliver a proper abstract and answer requisitions, he was prevented from doing.

Baggallay, Q. C., and *G. Simpson*, for the defendant.

The present is not a case in which the rules applicable to contracts apply. Until the two conditions, the service of the notice and payment of the money on the day named, are satisfied, there is no contract at all. After notice, but before payment, the lessor could not compel the lessee to complete,

Lord Ranelagh v. Mellon, 5 N. R. 101;

Joy v. Birch, 4 Cl. & Fin. 57.

They also referred to,

Daniels v. Davison, 16 Ves. 249.

The defendant, however, is still willing to complete on the plaintiff paying the costs of this suit.

Selwyn, Q.C., rejected this offer, and in reply referred to,

Lord St. Leonards' V. & P. 268 (14th ed.).

11 FEB. 1865.

THE LORD CHANCELLOR said: The covenant by the defendant, on which this suit is founded, is so worded as to impose on the lessee or his assigns the obligation of doing certain things as precedent conditions to any obligation arising on the part of the lessor.

If the lessee chooses to comply with the conditions the lessor is bound, but previously there is no mutuality of contract, for whilst the lessor is bound to accept the requisition of the lessee if the conditions are fulfilled, there is no obligation on the part of the lessee to fulfil them, or to avail himself of the lessor's engagement. It is, in fact, a conditional offer by the lessor, and the condition must be observed before the offer becomes binding. It is a mistake to apply to a stipulation of this kind the rules which are applicable in this Court to ordinary contracts for the sale of real estate.

In ordinary contracts of purchase, both parties are at once bound, and unless there be some special stipulation, or some peculiar circumstances, the time for payment of the purchase-money, or for the conveyance of the estate, is not deemed of the essence of the contract; but here, from the very form of the stipulation, certain things must be done before a binding agreement can arise.

If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it be first done on the one side before any obligation arises on the other. The things required must be done in the order and sequence which are stipulated.

Passing to the construction of the unilateral covenant before me, I think it clear that the delivery of the notice and payment of the purchase-money in the manner prescribed by the covenant are precedent conditions to be fulfilled by the owner of the lease before any contract arises binding the lessor. It is certainly true that the plaintiff, according to this construction of the covenant, will be under the necessity of paying the whole of the purchase-money before he can ascertain whether it is or not in the power of the lessor to make a good conveyance of the fee simple. If a good conveyance cannot be made, the money will be recover-

able. It was for the lessee to determine whether he would incur this risk at the time when he gave the notice of his intention to purchase.

When the lessee has paid the purchase-money in the manner prescribed, the obligation of the lessor arises. He is bound to deliver an abstract of title, and to hand over to the lessee all the deeds and evidences of title which are in his possession or power. He is also bound to obtain, if able so to do, all such further evidence or information in support or manifestation of the title as may be reasonably required. The purchaser is not at liberty to object to the title, but he may require it to be made out and proved to the full extent of the vendor's ability. All this, however, is to be done at the expense of the purchaser. The object of these provisions is plain, namely, to put the lessee in possession of the means of making out the title on any future occasion.

Such being the construction of the covenant or proviso, the question is, whether the plaintiff has performed the two preceding conditions. With respect to the delivery of a sufficient notice, it is immaterial to examine the evidence, because I find the defendant dealing with the plaintiff in a manner that clearly indicated a willingness to admit that a sufficient notice had been given, provided the purchase-money were paid at the expiration of the notice. Such is the necessary result of the letters of the defendant's solicitors, and of the formal notice dated the 21st of September, 1863. But the conclusion to be derived from the angry correspondence between the solicitors is this, that the suit has resulted from the refusal of the plaintiff to pay the purchase-money, until after the title had been examined, and the conveyance prepared. In this refusal, the plaintiff was wrong. Judging from a passage in one of the letters of the defendant's solicitors, it may be inferred, that they would have even waived the payment of the purchase-money on the proper day, if the plaintiff would have agreed to pay rent or interest until the completion of the purchase; but the plaintiff did not avail himself of this offer, and by the letters of his solicitor, he deliberately refused to pay the purchase-money, although warned by the defendant's solicitors that the power of purchasing would be lost.

At the hearing, the defendant's counsel, at my request, offered to the plaintiff that the defendant would convey the estate to him on receiving the purchase-money with interest, and the costs of the suit. This offer was to my regret declined by the plaintiff. I am obliged, therefore, to hold that in consequence of the non-payment of the purchase-money by the plaintiff on the 29th of September, 1863, there is no contract binding the defendant. I must, therefore, reverse the decree of the Master of the Rolls, and dismiss the plaintiff's bill with costs, except the costs of the evidence, which I do not think it right to give the defendant, partly because the defendant's defence was apparent on the bill itself, and partly because I think the defendant ought not to have raised an issue as to the sufficiency of the notice to purchase.

Lord Chancellor. }
25, 27 JAN., 11 FEB. 1865. } TAYLOR v. MEADS.

Will—1 Vict. c. 26, s. 10—*Power, Execution—Married Woman—Separate Estate—Power to Dispose by Will.*

A will executed with the formalities prescribed by the Wills' Act, is not a valid exercise of a power to appoint by any instrument in writing signed, sealed, and delivered in the presence of, and attested by, two or more witnesses.

Buckell v. Blenkhorn (5 Hare, 131), overruled.

When real estate is given to trustees in fee upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as if she were a feme sole.

This was an appeal from a decision of the Master of the Rolls, reported 4 N. R. 203.

William Meads, by his will, dated in 1841, devised two freehold cottages to trustees upon trust to stand possessed of the premises upon trust only for Elizabeth Meads, her heirs, and assigns, and to be assigned, released, conveyed, or otherwise well and effectually assured by Elizabeth Meads to any person or persons whomsoever, his, her, or their heirs and assigns, in such manner as Elizabeth Meads should at any time or times, and notwithstanding her coverture, direct or appoint by any instrument in writing, to be by her signed, sealed, and delivered in the presence of, and attested by, two or more credible witnesses, and in default of such direction or appointment, or so far as the same should not extend in trust only, for Elizabeth Meads, her heirs, and assigns for ever. And the testator declared his express will and meaning to be that Elizabeth Meads should, notwithstanding her coverture, stand possessed of the premises for her sole and separate use and benefit, and that the same should not in any manner be subject or liable to the debts, control, engagements, or interference of her husband, Percy Meads.

The testator died in February, 1842. Mrs. Meads died in November, 1845, without having exercised the power of appointment under the testator's will, but having by her will, dated in May, 1845, devised and bequeathed all her real and personal estate over which she had a disposing power to the use of her husband Percy Meads, his heirs, executors, administrators, and assigns absolutely.

The cottages were subsequently conveyed by the trustees to Percy Meads in fee, and after his death, in 1860, the plaintiff, as heir-at-law of Elizabeth Meads, instituted the present suit against the persons entitled to the cottages under the will of Percy Meads.

The bill prayed for a declaration, that the will of Elizabeth Meads did not operate as an execution of the power of appointment given to her by the will of William Meads over the houses in question; and that

the plaintiff, as heir-at-law of Elizabeth Meads, was entitled thereto.

The Master of the Rolls held, that the will was a valid execution of the power given to Elizabeth Meads by the will of William Meads, and dismissed the bill, with costs. Against this decision the plaintiffs appealed.

Hobhouse, Q.C., and Fischer, for the appellant.

1st. The will of Mrs. Meads not being under seal, is not a good exercise of the power of appointment.

Buckell v. Blenkhorn, 5 Hare, 131, is overruled by

Collard v. Sampson, 4 De G. M. & G. 224;

West v. Ray, Kay, 385;

Orange v. Pickford, 4 Drew. 363; s. c. 6 W. R. 738.

2nd. The will not being a good exercise of the power, cannot operate in any other way: for the testator having pointed out a special mode in which Mrs. Meads might alienate her estate, cannot be supposed to have intended to confer on her a general power of alienation, by the declaration that she was to be possessed of the property for her separate use, even if any such power could be thereby conferred.

3rd. There is no power of alienation incident to separate estate, which is a mere creature of the Court of Equity, and the rights incident to which must be strictly confined to such as are warranted by authority. The cases of

Peacock v. Monk, 2 Ves. 191,

Churchill v. Dibben, 9 Sim. 447,

Moore v. Morris, 4 Drew. 33,

Blatchford v. Woolley, 2 Dr. & Sm. 204,

Lechmere v. Brotheridge, 2 N. R. 219,

prove that a *feme covert* has never been regarded as having the power to dispose of estates of inheritance settled to her separate use. The sole object of the separate use was to protect a married woman against her husband. Even supposing that a gift for her separate use conferred on a married woman all rights of disposition incidental to the estate, still it could not confer on her a testamentary capacity, of which she was expressly deprived by

34 & 35 Hen. 8, c. 5, s. 14,

a statute, for this purpose, unrepealed by the Wills' Act.

J. W. Chitty, for the respondents.

1st. Before the Wills' Act a will, if sealed, was a good execution of such a power as the present,

Roscommon v. Fowler, 4 B. P. C. 523.

The 10th section of the Wills' Act makes sealing unnecessary; therefore this will is a good execution of the power.

2nd. A special power of appointment does not derogate from the rights of disposition incident to ownership: as is well settled by the cases relating to the ordinary uses to bar dower. Therefore, even if the will is not a good exercise of the power, it still

may be a good disposition of the property, if a gift to separate use confers a power to alienate. It is not true that the separate estate is simply a protection against her husband: it confers a power to alienate property of which the husband could never become possessed,

Major v. Lansley, 2 Russ. & My. 355.

A gift for separate use confers full power of alienation,

Fettiplace v. Gorges, 1 Ves. jun. 46;

Baggett v. Meux, 1 Coll. 138; s. c. 1 Ph. 627;

Alchison v. Le Mann, 23 L. J. 302;

Adams v. Gamble, 11 Ir. Eq. 269;

Thomas v. Jones, 1 De G. J. & S. 63.

Hobhouse, Q. C., in reply.

11 FEB. 1865.

THE LORD CHANCELLOR said—If a power be created to be executed by a deed or instrument in writing, although the words seem to indicate instruments *inter vivos* only, yet it is settled that it may be well executed by a will. The reason is, that the will literally answers the description of an instrument in writing. So, if either before or since the Statute of Wills (1 Vict. c. 26), a power be created to appoint real estate by deed or will to be respectively signed, sealed and delivered in the presence of and attested by three credible witnesses, it is clear that a will executed in manner prescribed by that statute would be a good execution of the power. This is by force of the 10th section of the statute, and not on the ground that the will answers the description in the power.

In the present case the power created in December, 1841, is to be executed by any instrument in writing signed, sealed and delivered in the presence of and attested by two credible witnesses, and it is contended that a will duly executed in conformity with the statute, but not sealed, is an instrument by which the power may be duly executed. But the power is not in terms a power of appointment by will, and whether it has been duly executed by a will or not depends on the inquiry, whether the will answers the description of the required instrument contained in the power. This the will does not do if one of the requisite solemnities is wanting, and it is clear that the statute does not make it answer the description.

Wherever the power is in terms a power to appoint by will, and the will is required to be under seal, the statute applies and makes the requisition null; but it does not apply where the power is to appoint by an instrument in writing under seal, for no will can execute a power that requires an *instrument* in writing under seal unless the will answers the description of such an instrument, which a will without a seal does not. Attention to the original principle on which a will was held to be a good execution of a power of appointment by any instrument in writing, namely, that the will answers the description in the power, would have prevented all misapprehension. The statute applies to powers requiring specifically a will

with the solemnities of sealing in addition to those solemnities rendered necessary by the statute, and in such case it declares that a will without such additional solemnities shall be sufficient, but it does not touch the case of a power requiring an *instrument* in writing signed, sealed, and delivered. In such a case, the only question is, whether the will be such an instrument, and no help can be derived from the statute. The difficulty, as is usual, does not arise from any uncertainty as to the principle, but from the reports of conflicting and inconsistent decisions, which is now the fruitful cause of litigation. The decision on this point, by Vice-Chancellor Wigram, in *Buckell v. Blenkhorn* (*loc. cit.*), followed by the Master of the Rolls, in *Collard v. Sampson* (*loc. cit.*), has, I think, been in effect overruled by the Lords Justices in the last case on appeal, and by the Vice-Chancellor Wood, in the case of *West v. Ray* (*loc. cit.*). I must direct, therefore, that the judgment of the Master of the Rolls be reversed.

This gives rise to the next question, upon which there has been no decision in the Court below; namely, whether in a case where real estates are conveyed or devised to trustees in fee upon trust for the sole and separate use of a married woman, and her heirs, she has the same power of disposition by deed or will over the equitable fee, as she would have if she were a *feme sole*. Can she convey the equitable fee without the necessity of the instrument being acknowledged in the manner required by the statute for the abolition of fines and recoveries, and can she, during coverture, devise the equitable estate by a will executed in conformity with the statute?

There is no difficulty as to the principle. When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to her separate property, an independent personal status, and to make her in Equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*.

To every estate and interest held by a person who is *sui juris*, the Common Law attaches a right of alienation; and, accordingly, the right of a *feme covert* to dispose of her separate estate was recognised and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use, to require the concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole lies between the married woman and her

trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and where the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at Law and in Equity.

With regard to ordinary equitable estates belonging to a *feme covert*, for example, where lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee who afterwards marries, Equity follows the Law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be conveyed, *inter vivos*, in the same manner as a legal estate; and in like manner an estate of this nature cannot be devised by a *feme covert*, for her incapacity to make a will of lands, by the 14th section of the 34 & 35 Hen. 8, c. 5, is not in this respect removed by the Act of 1 Vict. c. 26, but the interest created by the separate use is the creature of a Court of Equity, to which there is nothing correspondent at Law, and which would be deprived of its character, if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband, and personal disability in the wife. The violence thus done by Courts of Equity to the principles and policy of the Common Law, as to the status of the wife during coverture, is very remarkable; but the doctrine is established, and must be consistently followed to its legitimate consequences.

It is right to advert in few words to the statute law, and to the decided cases.

By the 14th section of the Statute of Wills, 34 & 35 H. 8, c. 5, it was enacted that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, should not be taken to be good or effectual in law. This enactment no doubt referred to lands vested in a *feme covert* in fee simple, and of which her husband was seised *jure uxoris*. Courts of Equity appear to have considered it as not applicable to separate estate, which was unknown at the time of the passing of the Act.

Between that time and the Act of the 1 Vict. c. 26, the doctrine of the separate use was fully established, and the *feme covert*, when not restrained from alienation, was considered in equity as entitled to the same rights of alienation as are possessed by persons *sui juris*.

Then followed the present Wills' Act, the 1 Vict. c. 26, by which it is enacted that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of the Act.

This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favour of the proposition that a *feme covert*,

when not restrained from alienation, has in equity the same *jus disponendi* over the separate estate by deed or will as she would have if free from the disability of coverture.

In addition to *Peacock v. Monk* (*loc. cit.*), and the well-known decisions of Lord Thurlow, it is sufficient to refer to *Tullett v. Armstrong* (1 Beav. 1; 4 My. & Cr. 390), *Baggett v. Meux* (*loc. cit.*), the judgment of Lord Justice Turner in *Atchison v. Le Mann* (*loc. cit.*), and finally to the recent case of *Adams v. Gamble* (*loc. cit.*), in the Court of Appeal in Ireland, where the point was expressly determined. From the earlier decisions, Lord St. Leonards, in his book on Powers, derives the same conclusion, which he states in these words: "Where a married woman has property settled to her separate use without any restraint on alienation, she is deemed a *feme sole*, and may dispose of it accordingly."

I must hold, therefore, that a *feme covert*, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* or will.

It was contended at the bar, that the effect of this devise was to give the married woman an estate to her separate use only, during the joint lives of herself and her husband, with remainder to herself in fee. But that is not the true construction of the will. The estate given to Elizabeth Meads in one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman.

It was also contended, that inasmuch as a special power of appointment was in terms given, no further power of disposition ought to be implied; but it is well settled that a special power of appointment does not derogate from the right of disposition which is incidental to ownership; and here the will of Mrs. Meads is a valid disposition, not as an exercise or by virtue of any power of appointment, but by virtue of that right of alienation which when not prohibited, is incidental to the separate estate in fee.

I cannot, therefore, concur with the judgment of the Master of the Rolls, or with the order he has made, and which must be reversed, and in lieu thereof I must declare that the will of Elizabeth Meads was not a good execution of the power given to her to appoint by an instrument in writing, to be by her signed, sealed, and delivered, but was a valid devise of the estate given to her and her heirs, and which it was declared, by the will of the testator, she should hold for her separate use; and the bill must be dismissed without costs.

Master of the Rolls. *Re THE LONDON, BIRMINGHAM, AND SOUTH STAFFORDSHIRE BANK (Limited).*
19 JAN., 11 FEB. 1865.

Bank—Lien—Share—Bill of Exchange—Debt.

A bill of exchange, taken for the amount of a debt, in the absence of any agreement, only suspends the remedy for the debt, and, until paid at maturity, does not discharge it.

Consequently, where a bank, which by their articles of association had a lien on the shares of any shareholder for any debt due from him to the bank, took from a shareholder bills of exchange in renewal of old bills not paid:—

Held, that the second bills did not, while current, deprive the bank of their lien for the debt accrued on the old bills.

This was a motion, under the 35th section of the Joint Stock Companies' Act, 1862, made on behalf of M. C. Hickie and H. A. Hankey, "That the register of the members of the abovenamed joint-stock company, called the London, Birmingham, and South Staffordshire Bank Limited, may be rectified by entering therein the name of the said M. C. Hickie, instead of the name of N. H. Palmer," as the holder of the twenty-five shares numbered 4884 to 4858, both inclusive, in the said company; and that the respondents (who were the bank and N. H. Palmer), might pay the costs of the application.

N. H. Palmer was a partner in the firm of Palmer & Co., in London. On the 29th of April, 1864, the bank discounted two bills for 2000*l.* and 1000*l.* respectively, payable three months after date, which had been accepted by N. H. Palmer in the name of the partnership. These bills were dated the 27th of April, 1864, and therefore became due on the 30th of July, 1864.

On the 26th of May, 1864, the bank discounted a similar bill for 500*l.*, dated the 12th of May, which became due on the 15th of August, 1864.

On the 28th of July two bills at three months' date, for 3000*l.* and 500*l.* respectively, accepted by Palmer & Co., were lodged with the bank by way of renewal of the three first bills, which were not paid at maturity; but it did not appear whether the first bills were retained by the bank or not. These second bills were dated the 28th of July, and therefore became due on the 31st of October: they were not negotiated, and on maturity were dishonoured.

On the 19th of July, 1864, N. H. Palmer became a shareholder in the bank for twenty-five shares of 100*l.* each, and was duly registered as the sole holder of such shares.

On the 27th of July, 1864, H. A. Hankey agreed to advance to Palmer & Co. the sum of 650*l.* on the security of a bill for the amount accepted by Palmer & Co. and of a transfer of the above twenty-five shares

in the bank. The bill was a three months' bill, dated the 27th of July, and therefore became due on the 30th of October, 1864. The certificate of the shares was sent to Hankey on the 28th of July, together with the bill, which was discounted by Hankey on the 30th of July. The receipt of the money was acknowledged by Palmer & Co., in a letter, as being paid "against twenty-five Birmingham Bank shares."

On the 4th of September Palmer & Co. stopped payment, and a notice of such suspension appeared in "The Times" on the 5th of September.

The transfer of the shares into the name of M. C. Hickie, as trustee for Hankey, was to have been made at the time of the advance; but Palmer & Co., to whom the preparation of the transfer was left, did not send it until the 7th of September, 1864, when a transfer in blank, dated the 30th of July, was sent to Hankey, who filled up the blank with the name of Hickie.

On the 8th of September, 1864, Hickie left the transfer and certificate of the shares at the bank for registration, and paid the registration fee. On the 7th of November he called for the new certificate, and was informed that the transfer could not be registered. The grounds for this refusal then, and afterwards, alleged by the bank were, first, that the suspension of Palmer & Co. had been publicly notified before the transfer was presented to the bank or signed by Palmer; and, secondly, that the bank were creditors against the estate of Palmer & Co. before the transfer was made, and had a lien on his shares for their debt.

This second reason was based on the following clauses in the articles of association of the bank—

"14. The Company shall have a first and paramount lien upon all the Shares of any Shareholder, for all moneys due to the Company from him alone or jointly with any other person"

"21. The Company may decline to register any transfer of Shares whilst the Shareholder, making the same, is either alone, or jointly with any other person, indebted to the Company on any account whatsoever, or unless the transferee is approved by the Board."

On the 24th September, 1864, a deed of arrangement for winding up the firm of Palmer & Co., under inspectorship, was executed; but the inspector made no claim to the shares.

Baggallay, Q. C., and Prendergast, for the motion.

There was no debt due from Palmer to the bank; for on the 27th of July the first bills were not due, and at the date of the actual transfer of the shares the second bills were still running. The case is not altered by the fact that the second bills were renewals of the first; for the second bills were given before the first fell due, and, therefore, before any debt accrued. And even if this act of the bank had not thus prevented the debt accruing, so long as the second bills were running, the bank could not have sued Palmer for the debt; and, therefore, there was no debt due within the meaning of the articles of association, which, as against

the bank, must be construed strictly. On a bill of exchange no debt is due until the payee can sue; and the bank were never able to sue Palmer until after the transfer to us.

Selwyn, Q. C., and Surridge, for the bank, contra.

1st. The only consideration for the second bills was the debt due on the first. The second bills postponed the enforcement of the debt, but still left the debt due. To hold that, when the bank had discounted a bill accepted by a shareholder, the acceptor could by a transfer of his shares deprive the bank of the security they held, would be an unreasonable construction of the articles. In September, when the transfer was made, there was a debt due from Palmer to the bank,—*a debitum in presenti solvendum in futuro*.

2nd. Under the 21st clause, the bank can refuse to register the transfer, whenever it would be disadvantageous to the bank to do so.

3rd. The transfer having been executed in blank, is void,

Hibblewhite v. M'Morine, 6 M. & W. 200;

Taylor v. The Great Indian Peninsula Railway Company, 4 De G. & J. 559.

W. Morris, for Palmer, asked for his costs.

Baggallay, Q. C., in reply, as to the 1st and 3rd points only.

1st. The bargain with Hankey was on the 27th of July. No debt was due then to the bank, and he had then a right to call for the transfer. Afterwards, the running of the bills prevented the debt being due.

2nd. The bank have waived this, for they did not mention it when we asked for the grounds of their refusal, and never raised the defence until it was raised at the bar. The objection cannot affect the equitable right to call for the transfer, which we had on the 27th, or at any rate on the 28th, of July.

11 FEB. 1865.

THE MASTER OF THE ROLLS said, that the sole question to be determined was, Whether the bank were creditors of Palmer before the bills of the 28th of July became due; for they claimed to have been creditors, and, therefore, to have had a lien on his shares, from the 29th of July, and to have been entitled, on that ground, to refuse to register the transfer of the shares in September.

The bank had alleged two other grounds for such refusal—first, that they had unlimited discretion as to registering a transfer; secondly, that the deed of transfer had been executed with the name of the transferee in blank. The first ground his Honour had disposed of at the hearing, holding, that the bank could not arbitrarily refuse to register a transfer. The second it was unnecessary to consider, as his opinion was, that on the 6th of September there was a debt due from Palmer to the bank.

It was laid down in 2 Williams' Saunders, 1038, that if a bill was taken on account of a debt, and no-

thing was said at the time which would extinguish the debt, then the debt remained, though the remedy for it was suspended. The cases of *Kearlake v. Morgan* (5 T. R. 513); *Puckford v. Maxwell* (6 T. R. 52); *Tapley v. Martens* (8 T. R. 451); *Siedman v. Gook* (1 Esp. 5); *Atkinson v. Hawdon* (2 Ad. & E. 628), showed, that when a bill was taken by the creditor, without any agreement that it should discharge the debt, if the bill (to use Lord Kenyon's expression) was not productive, the debt remained in force, though during the running of the bill the remedy for it was suspended. Lord Langdale had laid down the same rule in *Sayer v. Wagstaffe* (5 Beav. 423). His Honour did not think that the fact of the first bills having been renewed by the bank taking the second bills in lieu of them affected the case, which he decided solely on the principle of the cases before stated. A question might have been raised, whether, if the bank had retained the first bills, they could have sued on them for their debt before the second bills became due. But it did not appear whether they had delivered up the bills or retained them. But, in his Honour's opinion, a debt was existing all the time from Palmer to the bank, only the remedy was suspended until the bills became due; and until the bills were paid, the debt still remained. The company, therefore, were entitled, on the 8th of September, to enforce their lien for such debt, and to refuse to register the transfer.

As the statute gave his Honour jurisdiction over costs, they must follow the event. He should not make Palmer pay the costs, as asked by the motion; but he would not give him any costs.

Minute.—Motion refused, with costs.

Master of the Rolls. { In the Matter of THE
LIFE ASSOCIATION OF
ENGLAND (Limited).
Ex parte BLAKE.

Company—Winding-up—Contributory—
Fraud.

The secretary of a company sent to its brokers the prospectus of the company for distribution.

The prospectus published the names of persons as directors, some of whom were not qualified and had no shares:—

Held, that the misrepresentation was imputable to the company, and that a person taking shares on the faith of that and other misrepresentations was not a contributory.

Bell's Case (22 Beav. 35) followed.

The dicta of the Lord Chancellor in Nicol's Case (3 De G. & J. 387), and in *Mixer's Case* (4 De G. & J. 575), not followed.

This was a summons to remove the name of Thomas Blake from the list of contributories. The company was formed on the 12th of June, 1863, and had their offices in London. On the 20th of June, 1863, Nor-

folk, the promoter, manager, and actuary of the company, appointed Thomas & Smith to be brokers of the company at Bristol.

On the 3rd of July, 1863, MacCormack, the secretary of the company, sent a supply of the prospectuses of the company to Thomas & Smith, soliciting their active co-operation for issuing the same among their friends and clients. The prospectus contained the names of eleven persons, whom it represented to be directors of the company; it also contained the names of the company's brokers, among whom were Thomas & Smith, and it stated that prospectuses and all other information might be obtained from, and applications for the remaining shares might be made to, the secretary of the company, or the bankers, solicitors, or brokers before-mentioned.

On the 14th of July, 1863, MacCormack, the secretary, informed Thomas & Smith that the number of shares taken by the directors and others, and reserved for private connection, having exceeded the amount set apart for London, it had been resolved to close the share-list for residents in London and the suburbs, of which notice had been duly given; the directors, however, would keep open the lists for the provincial stock exchange in the meantime, and 750 shares had been kept for Bristol. Advertisements announcing the closing of the London share-list appeared in several newspapers, and were to the effect, that no further application for shares would be received from residents in London and the suburbs after the 14th of July, 1863. Smith swore that his firm made little effort to dispose of the shares till they saw the advertisement, and that the price of the shares was quoted in the newspapers from 2 to 2½ premium, and that placing full reliance upon the truth of the letters addressed to them by the company, they forwarded to several persons a copy of the prospectus, and amongst others to Thomas Blake; and on the ground that the London share-list was closed, and the shares actually selling at a premium, they recommended him to apply for an allotment of shares. On the 3rd of August, 1863, Smith informed Blake that the list had closed in London, but that he had a certain number of shares that he could dispose of, which were quoted at 2 to 2½ premium in London. Blake swore, that assuming the statements made by Smith and by the directors in the prospectus were true, he was induced to apply, and did apply, for 150 shares, which were accordingly allotted to him, and he paid the deposit thereon, and the scrip certificate was sent to him on the 28th of August, 1863. On the receipt of the scrip certificate, Blake observed that the shares were numbered as low as 2,605 to 2,755. He at once suspected that misrepresentations had been made, and, in order to test the truth of the statement that the share-list had been closed in London, a friend of Blake's, resident in London, went to the office of the company, and asked if he could have an allotment of shares, when he was told that he could have as many shares as he liked.

On the 4th of September, 1863, Blake's solicitor applied for immediate repayment of the deposit, and repudiated the shares, on the ground of misrepresentation.

On the 17th of October, 1863, Blake went to the office of the company and inspected the register, and discovered that three of the eleven gentlemen whose names were published in the prospectus as directors of the company held no shares therein, and had no qualification as directors, and, as he believed, were not directors, or even members of the company.

On the 21st of October, 1863, the board of directors repaid the deposit, and drew a line through Blake's name on the register.

Two calls were subsequently made, neither of which was paid by Blake.

On the 28th of May, 1864, a resolution was passed to wind up the company.

Hobhouse, Q.C., for Thomas Blake.

It was not necessary to enter into any nice discussion upon the authorities respecting the right of a person who has signed a deed, or entered into a contract with other persons who have signed the deed. Here the contract never had been completed, therefore Blake had a right to have his name taken off the register.

There were three misrepresentations,—as to the direction of the company, the closing of the lists, and the price of the shares. These were not merely the representations of Norfolk or Smith; but they were the representations of the company, contained in their prospectus, and in the advertisements, which latter must be imputed to the company. This case would be within the authority of

Bell's Case, 22 Beav. 35,
if Blake were still on the register.

Selwyn, Q.C., and *Ellis*, for the official liquidator.

The execution of the deed is only material on the question, whether a person meant to accept shares. After

Cookney's Case, 3 De G. & J. 170,
a mere verbal acceptance would be sufficient; here Blake had signed a written undertaking to accept the shares; the very day he signed, the contract was complete, and Blake was as much fixed as if he had signed the deed of settlement. The questions were, was there a contract, was there fraud of the company, and was there such a re-assignment of the contract as was required by the articles of association?

Blake did not dispute that there was an intention to take and give the shares, he paid the deposit and was registered as a shareholder,

Brockwell's Case, 4 Drew. 205,
decided that a company was liable for the fraud of its agent; but that case was overruled by

Nicol's Case, 3 De G. & J. 387;

Mixer's Case, 4 De G. & J. 575.

Here there was no fraudulent representations by the company or by the directors, and in order to fix the company it must be shown that the representations were made by the company,

Holt's Case, 22 Beav. 48.

The company was not a party to the prospectus, which might be issued by the directors,

Mizer's Case (*loc. cit.*),

When a company was first formed, the directors could not take shares, but they might intend to do so. Before Blake took the shares, he had an opportunity of looking at the names of the directors in the articles of association. Even if the three directors had not paid for their shares, that did not prevent them from being liable for the shares they represented as directors,

Wollaston's Case, 4 De G. & J. 437.

The representations in the newspapers could not be considered to emanate from the company. The company were not bound by the representations of the secretary,

Eyre's Case, 31 Beav. 177.

There was no release of the contract. The shares could not be taken away without the sanction of a general meeting, for the directors could not diminish the capital of the company without giving the shareholders an opportunity of expressing an opinion on the question.

THE MASTER OF THE ROLLS, without calling for a reply, said that the name of Thomas Blake ought to be omitted from the list of contributories. If the Court ought to adopt the argument of the respondent, a contract with a joint-stock company was different from any other contract, and by whatever misrepresentations it might have been induced, it became indelible, for though the contracting party had only taken one step, yet he was fixed, and no subsequent proceeding could emancipate him.

His Honour was of opinion, as in *Bell's Case* (*loc. cit.*), which, except by *Mizer's Case* (*loc. cit.*), did not seem shaken, that a company might commit fraud, that was to say it might induce persons by fraud to become members and could not reap benefit from the fraud. With regard to representations of persons being directors, it was the first thing to see who were directors; and it was a matter that pressed upon his Honour in *Abercorn's Case* (10 W. R. 451; 8 Jur. (N. S.) 951), that persons were responsible for seeing their names in the concern. Here with regard to the three directors, his Honour held it to be an act of the company itself; it did not appear that one of them had taken a single share, or that one of them had executed the deed of association, and it was a fair inference that not one of them was a member of the company. As to those three persons upon whom reliance might be placed, as having pledged themselves to the support of the company, it did not appear that they had one share, yet they were held out as directors in the prospectus.

A more gross misrepresentation could not be made than holding out as shareholders persons who were not in that position. Then, again, the company employed Thomas & Smith as brokers; and the manager wrote to them to tell them that the London list was closed, but that still some shares were to be disposed of. There was also a misrepresentation in the newspapers by some one—his Honour did not know by whom. It was unnecessary to consider whether there was sufficient fraud in the case, if Blake had taken no step, but when he found out the misrepresentations, he required to be released from his contract. Suppose he had said he took the shares by mistake, must he accept them? He said that he took them by misrepresentation; and upon that ground his resignation of the shares was accepted, and entered in the register. He had ceased to be a shareholder in October, 1863, having taken the shares in August, 1863; for two months he was investigating the matter, and ceased to be a shareholder; he was not called upon to pay calls, he could not claim a dividend; the relative position could not be enforced, the company could not say he was a shareholder subject to liability, but to have no benefit. He ought not to be placed upon the list, and his name must be removed. There would be no costs.

Master of the Rolls. } Re THE GENERAL ROLL-
11 FEB. 1865. } ING STOCK COMPANY
(Limited).

Company—Compulsory or Voluntary Winding-up—Suspension of the Order.

In the case of an insolvent company, where the only question is between a compulsory or voluntary winding-up, the Court will not postpone its compulsory process to facilitate an arrangement for a voluntary winding-up.

This was a petition by a judgment creditor to wind up a limited joint-stock company. A writ of *f. fa.* had been issued on the judgment, but a return "*nolle bona*" had been made.

The manager and secretary of the company stated by affidavit that a meeting of the shareholders had been called for the 16th day of February instant, for the purpose of passing a resolution to wind up the company voluntarily; that several of the creditors representing debts to a large amount, were of opinion that the company could be more effectually wound up voluntarily than under the order of the Court, and many of the shareholders concurred in that opinion; and he stated that he believed it would be for the interest of the company and the creditors that the sense of the meeting should be taken before any order was made by the Court for the winding-up of the company.

Jessel and R. C. Palmer, for the petitioner, asked for a winding-up order.

Southgate, Q.C., for other judgment creditors, also asked for a winding-up under the order of the Court.

Baggallay, Q.C., Selwyn, Q.C., De Gex, Hemming, and *Druce*, for the company and some of the creditors, asked that the order might be postponed till after the meeting, to give an opportunity for a voluntary winding-up. There was great reason to suppose that by such a course the debts of the company would be paid to a greater extent than they would be otherwise.

The Court would consider the benefit of all parties. Here a voluntary winding-up would be beneficial.

The order should at least be qualified so as to be without prejudice to the meeting, with liberty to discharge the order. They cited,

Re Package Parisien, 5 N. R. 178, 227.

THE MASTER OF THE ROLLS was of opinion that the petitioner was entitled to the order. If a creditor or a shareholder applied to wind up a company, and the company offered, if the petition was allowed to stand over, to supply funds to carry on their business, his Honour would be disposed to assist the company for that purpose; but where, as in the present case, the only question was, whether the winding-up was to be voluntary or compulsory, his Honour did not know what facility for advancing funds existed in the one case, which did not exist in the other. As the matter stood, a case was made by the petitioner who was a creditor of the company, and whom they did not pretend to be able to pay; all that they said was, that they thought more would come to the creditors under a voluntary winding-up than under a compulsory winding-up. In that state of things the petitioner was entitled to an order: but this would not prevent any persons from making any such application to the Court as they might think they were entitled to make.

Druce asked the Court to declare that the order was made without prejudice to the meeting.

THE MASTER OF THE ROLLS declined to do so.

Master of the Rolls. { GALLOWAY v. THE MAYOR,
COMMONALTY, AND
19 JAN. 13 FEB. 1865. { CITIZENS OF THE CITY
OF LONDON. (2).

*The Holborn Valley Improvement Act, 1864—
Improper Agreement — Sanction of Legis-
lature.*

A bill was pending to enable the Corporation to construct a new street: on the eve of its receiving the Royal Assent the Corporation agreed with a railway company that they would take the whole of certain scheduled lands and resell them to the railway company. This agreement was held to be improper by the Lords Justices (Galloway v. The Mayor, &c., of London, 4 N. R. 77). The Corporation subsequently obtained an Act authorising further improvements which scheduled the same

lands. The Act contained a clause preserving all rights under the above agreement:—

Held, that by this clause the Legislature sanctioned the agreement.

Semble, in the absence of the clause, the mere renewal of the power of the Corporation to buy the lands, destroyed the objections to the propriety of the agreement.

This suit was similar to one previously instituted between the same parties (reported 4 N. R. 77, 422).

The bill in the present suit stated that the defendants had stated their intention of appealing to the House of Lords against the decree in the former suit, but that they had not yet done so. Many of the material facts are stated in the report of the former suit.

The Holborn Valley Improvement Act, 1864, empowered the Corporation (section 2) "to execute the following viaduct or raised way, new streets, and improvements, namely"—

1. A viaduct for the purpose of a high-level street across Holborn Valley.

2, 3, 4, 5. Making or widening certain specified streets which did not approach the plaintiff's land.

6. An alteration in the levels of Farringdon Street and Farringdon Road, "and in connection therewith, the alteration and improvement of the levels of the street authorised by the Metropolitan Meat and Poultry Market (Western Approach) Act, 1862."

7. Providing space for the erection of houses adjoining "the viaduct or raised way, new streets, and improvements aforesaid."

8. The stopping up certain specified streets.

The Act incorporated the "London (City) Improvement Act, 1847," except section 19, and "The Lands Clauses Consolidation Act, 1845" (except that part of the latter Act with respect to the purchase of lands otherwise than by agreement), and "The Lands Clauses Consolidation Acts Amendment Act, 1860."

The 37th section was as follows—

"And whereas certain lands may be taken under the powers of this Act, which were delineated on the plans and described in the books of reference, mentioned in the 4th section of the 'Metropolitan Meat and Poultry Market (Western Approach) Act, 1862,' and in respect of such lands an agreement was, under the authority of that Act and the Metropolitan Railway Acts, entered into between the said Mayor, Commonalty, and Citizens, and the Metropolitan Railway Company, and it is expedient that the rights of that company, under such agreement, should be preserved, therefore nothing in this Act contained shall prejudice or affect the rights of that company, under the said agreement, but all the covenants and provisions thereof shall be as applicable to the same lands if purchased under the powers of this Act as they would have been if they had been purchased under the powers of the said 'Metropolitan Meat and Poultry Market (Western Approach) Act, 1862.'"

The schedule to this Act, and the deposited plans and book of reference, included all the plaintiff's land. But although the whole was within the limits of deviation, only a portion was required for the actual width of the new street, though more might be required if the levels were altered under the 6th clause of the 2nd section.

This Act received the Royal Assent on the 23rd of June, 1864. Shortly afterwards the plaintiff was served with notice, dated the 30th of June, 1864, that the defendants intended to take certain portions of his land for the purposes of the Act of 1864, and that they were willing to treat with him for the same. The notice expressly reserved to the defendants the right to take the land under the Act of 1862, and their rights in the previous Chancery suit. The notice included all of the plaintiff's land north of West Street (which was what the defendants had agreed to sell to the railway company), but only included a portion of his land south of West Street.

The plaintiff alleged that the greater part of the land comprised in this notice was required solely for the purposes of the agreement with the railway company of the 26th of June, 1862, and not for the purposes of the Act of 1864. He had offered to sell the whole of his interest for 70,000*l.*, if his costs in the former suit were paid, or to treat for the sale of such portion as was actually needed for the new street.

The plaintiff, after some correspondence, filed his bill in this suit on the 14th of October, 1864, to restrain the defendants from proceeding under the notice of the 30th of June, 1864, and on the 8th of December, 1864, the defendants filed their answer. They stated, that if there had been no agreement with the railway company, they would have required all the plaintiff's land, because they usually took land sufficient to give them a proper frontage to the street, so that by selling such lands they might repay the cost of making the street, but they acknowledged that only a small portion was required for the actual line of the street. They stated that they had not finally matured their views as to the levels of the streets, and that their intentions respecting the use to which they intended to put the plaintiff's land were not yet formed. They stated, however, that they considered themselves bound by the agreement with the railway company, and intended to carry it out; and they submitted that it had been expressly sanctioned by Parliament in the 37th section of the Act of 1864.

By the London, Chatham, and Dover Railway (New Lines) Act, 1864, the Metropolitan Railway Company were empowered by agreement with the London, Chatham, and Dover Railway Company, and with the consent of the Corporation, to take certain land, including that of the plaintiff. The agreement between the companies had been made, but the consent of the Corporation had not been yet obtained.

The cause now came on upon a motion, which was

by arrangement converted into a motion for decree. The notice of motion was to restrain the Corporation "from issuing any precept, or commencing, or prosecuting any proceedings for valuing any part of the plaintiff's property in the bill mentioned, and from prosecuting any other proceedings under the powers of 'The Holborn Valley Improvement Act, 1864,' for the purpose of purchasing or taking any of the plaintiff's said property until the hearing of this cause, or until the further order of this Court, or until the portion thereof (if any) which they shall *bond fide* require to purchase or take for the purposes of the said Act shall have been ascertained, and they shall have given the plaintiff a proper notice of their intention to take the same under the said Act, and a proper opportunity of coming to an agreement with them as to the purchase-money or compensation to be paid in respect thereof."

Roll, Q.C., Selwyn, Q.C., and Bagshawe, for the plaintiff, besides the same arguments that were used in the previous suit, contended,—

That the answer showed that the Corporation had not exercised the discretion given them by the Act of 1864, and had come to no judgment at all respecting what lands were to be taken.

They were going to sell to the railway company without building on the land, which they could not do, as their power to sell lands taken under the Act of 1864 was given to them only by the 46th and 47th sections of the Improvement Act, 1847.

That the 37th section of the Act of 1864 did not alter the relation between the Corporation and the plaintiff, and did not affect the question.

Cairns, Q.C., and Swanston, for the defendants, in addition to the arguments urged in the previous suit, contended,—

That the Act of 1864 expressly authorised the Corporation to carry out their agreement with the railway company.

That the Lords Justices had before objected that the railway could not buy, but the Act of 1864 expressly authorised them to buy these lands.

That by the London, Chatham and Dover Railway (New Lines) Act, 1864, the Metropolitan Railway Company could take the plaintiff's land.

That the Corporation had exercised their judgment by giving the plaintiff notice to treat. They believed they would want the lands for the improvements; they, at all events, wanted them for the purpose of fulfilling the agreement which the Legislature had told them to perform.

Roll, Q.C., in reply.

If Parliament had intended to sanction this agreement, they would have done so expressly, which they had not done. The Corporation were as much fettered in the exercise of their judgment as they were before the Act of 1864.

13 FEB. 1865.

THE MASTER OF THE ROLLS said, that the question turned on the proper construction of the Acts in question, having regard to the relative position of the parties themselves. His Honour had carefully read the pleadings and evidence in the first suit, the Acts of Parliament, and the judgment of the Lords Justices, for the purpose of considering how far their decision governed the present question. Their judgment established two things.

The first point established was, that the notice given to the plaintiff, in May, 1863, if properly given, would have authorised the Corporation to take all his land; and that the Corporation were the sole judges of whether it was or not wanted for the purposes of the Act, inasmuch as the objects of the Act of 1862, was, not only to authorise the construction of the street, but also to enable the Corporation to obtain sufficient funds for carrying out the authorised improvements.

The second point established was, that the agreement with the Metropolitan Railway Company was invalid, for three reasons: First. Because, at the date of the agreement the railway company had no power to purchase land, although they had by an Act subsequently passed. Secondly. Because, when Parliament gave the Corporation power to purchase, they did not mean to give other incapacitated persons power to purchase. Thirdly. Because the agreement was entered into before the Act passed, and because, before the time arrived for the Corporation to exercise their judgment under the Act, they fettered themselves, and bound their judgment, by making it incumbent on themselves to take all the lands of the plaintiff, although, after the passing of the Act, they might, in the exercise of their discretion, have thought that part only would be sufficient; while the Act meant them to exercise *bonâ fide* their discretion, unfettered by any previous transactions.

The question now arose, how far this judgment was affected by the subsequent passing of the Holborn Valley Act, 1864. The primary object of that Act was, to make the improvements specified in it; but, by the incorporation with it of the City Improvement Act, 1847, power was given to the Corporation, not only to make those improvements, but to sell lands for the purpose of raising money to pay for the improvements. Moreover, the schedule to the Act contained lands, which did not lie exactly in the direction of the new streets, and could only have been included for the purpose of re-sale. This was the construction of the Improvement Act, 1847, which was laid down by Wood, V.-C., in his judgment, and was not affected by the judgment of the Lords Justices. His Honour had no doubt that purchase of land, for the purpose of raising money by re-selling it, was one of the objects of the Act of 1864; and that the defendants had power to purchase, for this purpose, any of the lands comprised in the schedule to that Act. Consequently, the defendants, if unfettered by previous transactions, might have

taken and resold all the plaintiff's land, although it was not required for the actual construction of the improvements.

However, if the 37th section of the Act of 1864 were omitted, his Honour might have considered that the case was almost the same as that decided by the Lords Justices. But the Legislature having the agreement of the 26th of June, 1862, before them, had introduced the 37th section into the Act of 1864. That section (as his Honour pointed out in detail), expressly referred to the agreement of the 26th of June, 1862, and his Honour's opinion was, that by that section the Legislature had pronounced an opinion, which was equivalent to a declaratory enactment, that the agreement was valid, and conferred rights on the railway company. The Legislature, knowing that the Lords Justices had decided that the plaintiff's land, except at least so much as was actually wanted for the street, could not be purchased under the Market Act 1862, had given the Corporation power to purchase this land. It was impossible for the Court to say that the power so given by the Legislature should not be executed. That the powers of the Corporation to purchase were discretionary, and not under any control, was the opinion of Wood, V.-C., and apparently of the Lords Justices, and certainly was his Honour's opinion. Therefore, as the Corporation had, since the Act of 1864 was passed, exercised their judgment, with respect to the plaintiff's land, their decision was not to be controlled. If the 37th section of the Act of 1864 had been omitted, the Corporation might have taken all the plaintiff's land and resold it to whomsoever they pleased, but that section enacted that if they took the plaintiff's land they were bound by their agreement to resell it to the Metropolitan Railway Company.

His Honour had no doubt that the Act of 1864 removed the foundation of the decision of the Lords Justices, adverse to the defendants. For the Legislature in 1864, after all that had passed, having the agreement and the decision of the Lords Justices before them, and aware that the Corporation had fettered their judgment, expressly renewed the powers of the Corporation to take the land in question; and further removed the objection of the disability of the Metropolitan Railway Company, raised by Turner, L.J., by expressly authorising the railway company to buy this land. It would be overruling a plain enactment of the Legislature to grant this motion.

In his Honour's opinion the Legislature had relieved the Court from a great, if not insuperable, difficulty. The Lords Justices had granted the injunction "until the portion thereof which they *bonâ fide* require to purchase to take for the purposes of the said Act shall have been ascertained;" but how could the Court determine what portion would *bonâ fide* be required for the purposes of the Act? If the Corporation declared that they *bonâ fide* wanted all the land for the purposes of the Act, the Court could not say that they could only *bonâ fide* require what would suffice

for the exact breadth of the street, for to do so would, if carried out in the case of all the other lands, stop the whole improvement for want of funds. If the Court were to consider how much more than the exact breadth of the street were *bond fide* required, it would have to consider all the various details of carrying out the works, and whether they were economically conducted or not, and would be entangled in inextricable difficulties at every step. His Honour doubted, therefore, whether under such a decree, the Court could ever arrive at a satisfactory conclusion. He had intended that the costs of the motion should be costs in the cause, but as the motion had been by arrangement turned into a motion for decree, he should dismiss the bill with costs.

Master of the Rolls. } ANONYMOUS.
11, 18 FEB. 1865.

Practice—Writ of Ne Exeat.

A writ of ne exeat will not be granted in the case of a contested and unsettled account.

The defendant in the present suit had acted as manager of a business belonging to the plaintiff. The suit was instituted for an account of the defendant's dealings and transactions in the business. The plaintiff swore that the defendant had drawn upon the business to the amount of 8,272*l.*, whereas the total out-goings of the business would not have exceeded 4,000*l.*, and that he believed the defendant was indebted to him on the balance of account in respect of the business in the sum of 4,000*l.* at the least; but that the accounts were complicated and voluminous, and could not possibly be taken save under the direction of the Court. The plaintiff also swore, from the information and belief acquired by him, that the defendant intended in a week at the latest to go to America, out of the jurisdiction of the Court, whereby the recovery of the debt due to the plaintiff would be greatly endangered, and the plaintiff would lose the same, or was in great danger of doing so. Upon these allegations the plaintiff applied *ex parte* for a writ of *ne exeat* against the defendant.

Bagshaw, for the plaintiff, cited,
2 Daniel's Chanc. Prac. 1279 (3rd ed.);
1 Smith's Chanc. Prac. 840;
Rico v. Gualtier, 3 Atk. 501;
Jackson v. Petrie, 10 Ves. 164;
Buller v. Dorant, cited in Beames on Ne Exeat,
52, 53;
Sherman v. Sherman, 3 Brown, C. C. 370;
Anderson v. Stamp, 5 N. R. 268.

THE MASTER OF THE ROLLS said, that this was not a case for a *ne exeat*. Where an account was delivered by the defendant, and the defendant had admitted that some sum was due from him, the Court would mark the writ with the amount. It was shown

in *Flack v. Holm* (1 J. & W. 405), that when there were disputed items, the Court would not allow one party to fix the amount and prevent the other party from leaving the country until that amount was paid. If this were allowed, the result would be, that when there was a contested account, and both parties intended to leave the country, each of them by swearing that a balance was due to him might obtain a writ of *ne exeat* against the other, a result which was obviously absurd. *Flack v. Holm* (*loc. cit.*) was very clear on the point. If, omitting disputed items, a sum was clearly due, the Court would mark the writ with the ascertained amount. In *Jackson v. Petrie* (*loc. cit.*), Lord Eldon said that the matter must be as clear in the case of an equitable as in that of a legal debt. The *dicta* which had been cited, in his Honour's opinion, required some qualification, and he must refuse the writ.

Master of the Rolls. } MATHERS v. GREEN.
16, 17 JAN., 14 FEB. 1865.

Patent—Joint-Owners—Right to Profits—Account.

A joint-owner of a patent is not entitled to work the patent on his own account, but is subject to render an account of profits to his co-owner.

Mode of taking the account in the case of a double patent.

Re Russell's Patent, 2 De G. & J. 130, distinguished.

The facts of this case were shortly to the following effect—The defendants were, father and son, who carried on the business of manufacturing engineers, at the Smithfield Iron Works at Leeds. In June, 1859, Mr. Green the father, took out a patent for a lawn-mowing machine. In June, 1861, Mr. Green the father, employed his son to conduct the London branch establishment for him; and in January, 1863, he afterwards took him into partnership with him.

In the year 1861, the plaintiff was a mechanical engineer, and it appeared by the evidence that he was employed by various manufacturers to examine their machinery, and to suggest improvements in it. On the 5th of September, 1861, he came, in that character, to the works of Mr. Green, and remained there up to the 25th of March, 1862, under an agreement that he was to be paid at the rate of 200*l.* per annum.

After September, 1861, and in the latter part of that year, the plaintiff invented some alterations in the construction of the lawn-mowing machines, whereby they were greatly improved. In order to secure these inventions, two patents were taken out in the joint names of the two defendants and of the plaintiff. The first, which was for improvements in the lawn-mowing machine, bore date the 20th of December, 1861; and the second, which was for improvements in chains giving motion to chain wheels, bore date the 31st of December, 1861.

The question was, what were the rights of the plaintiff in respect of these patents? He claimed one-third of the profits made by the defendants arising from the use of them. This was contested on the part of the defendants. They contended that the plaintiff agreed to take, and did take, his salary, at the rate of 200*l.* per annum, during the time that he was employed by the defendants, as full payment for his services, in and about the making of such invention, and in full satisfaction of all claims by him in respect of that invention. The Court was of opinion, however, that the defendants failed in making out any such agreement.

Southgate, Q.C., and *Kingdon*, for the plaintiff, argued, that the defendants had not made out that there was any agreement binding the plaintiff to give up his interest in the patent. A parol agreement was insufficient,

29 Car. 2, c. 3, s. 17;

15 & 16 Vict. c. 83, s. 35;

Follett v. Delany, 2 De G. & Sm. 235.

The register was *prima facie* evidence of ownership.

Suppose the plaintiff was the servant of the defendants, would the agreement stand, no assignment having been executed? Could a master take from his servant an assignment of his invention for a small consideration? or was he not in the situation of a doctor or other person standing in a commanding position? In *Firth v. Ridley* (4 N. R. 415, but unreported on this point), Lord Justice Knight Bruce observed, that it would take a great deal to convince him that such a transaction between master and servant could stand. The defendants could not discharge themselves from the onus of showing that the transaction was fair; but, in fact, the agreement could not be proved at all.

If the plaintiff was a joint-owner of the patent, he would be entitled to an account of the profits realised therefrom,

Hancock v. Bewley, Johns. 601.

Part of the business of a patent consisted of vending the patent; there must be, therefore, an account of the vending of the patent by two of the three co-owners. Joint-tenants and tenants in common generally had a right to an account as a matter of course,

Leake v. Cordeaux, 4 W. R. 806;

Henderson v. Eason, 17 Q. B. 701.

In

M'Mahon v. Burchell, 2 Phill. 127,

one of the co-tenants had taken possession of a house, and the decision was, that he could not be charged with an occupation rent.

Selwyn, Q.C., and *Phear*, for the defendants, argued that the patent law contained nothing equivalent to the Statute of Frauds or the Ship Registry Acts.

The register was *prima facie* evidence, but did not prevent the proof of facts *aliunde*.

An inventor might not be able to be the manufac-

turer of the patent, for he might not have the means of introducing his invention to the world; but the means had in the present case been furnished by the defendants long before their connection with the plaintiff.

All there was in a patent was a right to prevent others infringing the patent-rights. But if one of several owners of a patent chose to set up as a manufacturer, there was nothing to prevent him. No account of profits could be required from him. If a licence was granted, that was another thing. Supposing after the defendants had established their business, there had been a loss, could they have gone to the plaintiff for one-third of the loss because he could have had one-third of the profits? He would have said he never agreed to set up a manufactory. It was a fallacy to say the defendants were using the plaintiff's property. If a man could not be made to contribute for losses, how could he be entitled to profits? The rights of joint-proprietors of a patent were determined by,

Re Russell's Patent, 2 De G. & J. 130.

The only cases in which, where there were several owners of a single thing, an account might be had against one of them for his use of that thing was, when there was an exclusion of the others.

The right to an account was founded on exclusion. In the case of a tenant in common occupying a house there was no right to an account, because there was no exclusion. Exclusion, from fortuitous circumstances, gave no right to an account.

Southgate, Q.C., in reply, observed that there were numerous cases in which persons might be entitled to profit without being liable for loss; mine-owners or ship-owners might be liable for profit and unable to call for contribution for loss.

Re Russell's Patent (loc. cit.)

did not settle the right of patentees, if they had had their patent granted. If the copyright of a book was vested in two persons, an author and a publisher, who afterwards quarrelled, could either publish the book and under-sell his co-owner, or if one of them published would he not be accountable for profits? Suppose the publisher quarrelled with the author, and sold 1000 copies of the book, and made 1000*l.*, could he take the money without accounting to the author for a share?

The right to a patent was indivisible, and could only be exercised by all the owners of the patent. If one of the owners used the patent for his own benefit, he must account to his co-owners.

THE MASTER OF THE ROLLS said, that he was of opinion that the plaintiff was entitled to all such rights as flowed out of his being one of three joint owners of a patent. What those rights were had been the subject of much discussion: the counsel for the defendants contending, on the authority of *Re Russell's Patent (loc. cit.)* that the rights of persons, who were

jointly interested in a patent, were that each of them was entitled to use it freely, and to have an equal share in the profits arising from the granting of licences to others who used it, but nothing more. In the case of *Re Russell's Patent* (*loc. cit.*), no difficulty or contest arose on this point. The there contest was, who was entitled to the patent; and as soon as the Court had determined that, the plaintiff and the defendant were alike entitled to it, the mode of working that declaration out was settled to the satisfaction of both parties, in the manner his Honour had mentioned,—viz. by assigning the patent to two trustees in trust for each for them to use separately. But it was obvious, that, if that course were adopted in the present case, it would work great injustice. The patent in which the plaintiff was interested, was for the improvement of a patent, which was the property of the defendant, Mr. Green the father; and, consequently, the plaintiff could not use the patent in which he was interested, without infringing the patent which belonged to the defendant, who could, of course, use both as he pleased. Virtually, therefore, such an order, if made here, would be to give the whole patent to the defendants; but his Honour was of opinion, that, in such a case as the present, the rights of the plaintiff were measured by one-third of the profits made by the use of this patent for improvement of the former: and that the defendants must account to the plaintiff for one-third of any profits which they had so made. It was true that this account would not be a matter very easily to be ascertained, for the profits arising from the prior patent were first to be ascertained or estimated, and then to be deducted from the profits made by the sale of the improved lawn-mowing machines, and this was to be done before the profits arising from the second patent could be ascertained. But however difficult this might be, still his Honour was of opinion that this must be done, and that this account must be taken by the Court, in the best way it could be taken, unless the parties could come to some satisfactory arrangement on the subject between themselves, so as to supersede this necessity. If any licences were granted to use this patent separately, there would be no difficulty as to these, as, in respect of this, the plaintiff would simply be entitled to one-third of the money derived from such licences.

Stuart, V.-C. } **FORBES v. PRESTON.**
8 FEB. 1865.

Practice—Motion to Dismiss for Want of Prosecution after Amendment—Cons. Ord. XXXIII. r. 12.

Where a plaintiff amends his bill, and requires an answer from one defendant but not from another, the defendant who is not required to answer may move to dismiss for want of prosecution, if the plaintiff, after

getting in the other defendant's answer, delay taking any step in the cause for so long a time as to warrant the conclusion that he does not intend to bring the cause to a hearing.

The bill in this case was filed in 1862. After being amended several times it was finally re-amended in April, 1864, by adding parties, who were required to answer. Preston, the original defendant, was not required to answer the re-amended bill.

The parties made defendants by re-amendment, put in their answer on the 15th of October, 1864.

The plaintiff not having taken any step in the cause subsequent to that time,

Osborne Morgan, for the defendant Preston, moved to dismiss the bill for want of prosecution. He referred to the

Cons. Ord. XXXIII. r. 12.

Birkbeck, for the plaintiff, contended, on the authority of

Brown v. Butter, 21 Beav. 615,

that the rule did not apply.

STUART, V.-C., held that the motion was right. The Master of the Rolls had said in *Brown v. Butter*, (*loc. cit.*), that great injustice would be done if, under the special circumstances of that case, the plaintiff's bill were dismissed. Here, on the contrary, great injustice would be done to the defendant, if the bill were allowed to hang over him for an indefinite period. The plaintiff's conduct did not warrant the conclusion that he intended to proceed with the suit.

The bill, therefore, must be dismissed with costs, unless replication were filed within a week, and the plaintiff must pay the costs of the motion.

Wood, V.-C. } **GOUCHER v. CLAYTON.**
16, 17 JAN. 9 FEB. 1865.

Estoppel by Judgment.

The defendants to a suit by a patentee for infringement are not estopped from denying the novelty of the patent by the fact that some of them, against whom the same plaintiff had formerly brought an action for infringement of the same patent, had allowed him to sign judgment before any declaration was filed.

This was a suit by a patentee for an injunction and an account against the defendants, the present members of the firm of Clayton & Co. By their answer the defendants denied the novelty and utility of the patent. It was stated in the bill, and appeared by the evidence, that in the year 1854 the plaintiff had brought an action in the Court of Queen's Bench against the then members of the firm of Clayton & Co., for an infringement of his patent. It appeared, on examining the judgment roll, that the plaintiff had (before filing any declaration), signed judgment by consent for forty shillings

damages and costs. Two of the persons who were members of the firm of Clayton & Co. at the date of the action had since left the firm, and two others had taken their places.

The cause was heard on motion for decree.

Willcock, Q.C., and *Langley*, for the plaintiff, argued,

The effect of the judgment is to estop the defendants from denying the validity of the patent,

Andrews v. Diggs, 4 Exch. 827 ;

Chitty, Practical Forms in Q. B. 482 ;

Allason v. Stark, 9 Ad. & E. 255.

Jessel, for defendants in the same interest.

Roll, Q.C., *Grove, Q.C.*, and *Karslake*, for the principal defendant, cited,

2 Sm. L. C. 612 ;

Outram v. Morewood, 3 East, 346 ;

Wallon v. Waterhouse, 2 Wms. Saund. 420.

17 JAN., 9 FEB. 1865.

WOOD, V.-C., said, that not all the defendants, whom it was now sought to estop by the judgment, had been parties to the action in which the judgment had been obtained, and that as no declaration had been filed, it did not appear whether the novelty and utility of the patent had been put in issue in the action : and that although such a judgment would have been sufficient to sustain an interlocutory application, it was not sufficient in the present state of the cause to estop the defendants from raising the defence of want of novelty and utility.

Wood, V.-C. } NICHOLL v. JONES.
10, 11 FEB. 1865. }

Production of Documents—Form of Summons.

Counsel's brief and the notes of a solicitor upon a copy of the shorthand writer's notes of a trial in the Probate Court will be protected from production ; but counsel's indorsement on his brief of what actually took place in Court, and the copy of the shorthand writer's notes, are not privileged.

The Court will not order the production of a bundle of documents.

The practice of considering questions as to the production of documents, in respect of which privilege is claimed, on a summons to consider the sufficiency of the affidavit as to documents, will not be followed for the future.

In the year 1858, the plaintiff in the present suit instituted the suit of *Nicholl v. Davies* in the Probate Court, for the purpose of establishing a certain writing to be the will of M. B. Nicholl. Upon the trial of the issues in that suit a compromise was come to. Counsel appeared, instructed by a solicitor whom Eliza Jones had not authorised to act for her, and consented to the compromise on her behalf. The suit of *Jones v. Davies* was another suit in the Probate Court, in

which Eliza Jones was a co-plaintiff, for the purpose of establishing another document as the will of M. B. Nicholls.

The plaintiff filed his bill in this cause in 1858, making Eliza Jones a defendant, and praying for specific performance of the agreement for compromise.

In February, 1864, the defendant Eliza Jones filed the usual affidavit as to documents, and objected to produce, *inter alia*—the briefs of her counsel in the Probate Court, one of which had, and the other had not, counsel's indorsement,—a copy of the shorthand writer's notes of the proceedings in the Probate Court, with the observations of her solicitors and proctors thereon,—and a bundle of documents relating to the suit of *Jones v. Davies*.

On the 21st of December, 1864, the plaintiff took out a summons, to consider the sufficiency of the affidavit. The summons was adjourned into Court.

E. R. Turner, for the plaintiffs, argued—

Although the form of the summons is for insufficiency, still we are entitled to raise the question, whether the documents, as to which privilege is claimed, ought to be produced. The true rule is, that documents will be protected on the ground of professional confidence only when they have reference to the very litigation in which it is sought to have them produced,

Hughes v. Biddulph, 4 Russ. 190 ;

Herring v. Clobury, 1 Phill. 91 ;

Taylor on Evidence, § 667.

The rules as to production of cases laid before counsel, are laid down in

Radcliffe v. Fursman, 2 Br. P. C. 514 ;

Bolton v. Corporation of Liverpool, 3 Sim. 467 ;

1 M. & K. 88 ;

Nias v. The Northern and Eastern Railway Company, 3 M. & Cr. 355 ;

Fligh v. Robinson, 8 Beav. 22 ;

Lord Walsingham v. Goodricke, 3 Hare, 122 ;

Beadon v. King, 17 Sim. 34 ;

Pearse v. Pearse, 1 De G. & Sm. 12 ;

Manser v. Dix, 1 K. & J. 451.

All these cases are distinguishable from the present. Here, when counsel were instructed, there was no expectation of the present litigation.

The briefs are not privileged,

Walsham v. Stainton, 2 H. & M. 1.

The indorsements on the briefs are not privileged. We only want to see them for the purpose of ascertaining who was before the Probate Court, a fact which, according to the practice of that Court, is not stated in the order.

Freeling, for Mrs. Jones.

The question, whether a particular document is or is not privileged, cannot be raised on this summons.

Assuming that the question can be raised, there are, in addition to the cases cited above,

Calley v. Richards, 19 Beav. 401 ;

Ford v. De Pontes, 5 Jur. (N. S.) 993;
2 Seton on Decrees, 1060.

R. Pearson and Swanston, for other defendants, cited as to the form of the summons,

Cox's Equity Chamber Forms.

The time that has elapsed between the affidavit being filed, and the summons being taken out, is a sufficient answer to the summons for *insufficiency*; and it is irregular to discuss questions of production on a summons for insufficiency.

The indorsement on the brief is a mere private communication to the client, and is therefore privileged.

The Court will not order us to produce the bundle of documents without further information as to the nature of the documents contained in it.

Turner, in reply.

11 FEB. 1865.

WOOD, V.-C., said, that it was the custom to discuss the question of production on a summons for insufficiency of affidavit; but that he was of opinion, that the practice should for the future be altered, and that when it was wished to obtain production, the summons should distinctly state so. The briefs were privileged documents, but the shorthand writer's notes must be produced, with liberty to the defendant to cover up the observations of the solicitors and proctors on them. He did not consider the indorsements on the briefs of what took place in Court, to be confidential communications; and he was of opinion that, so far as they were the counsel's notes of what actually took place in Court, they must be produced. It was not the practice of the Court to make an order for the production of a bundle of documents, as it was possible that some of them ought to be protected. The proper course to be adopted to obtain production of documents contained in a bundle, was by excepting for insufficiency; but in the present instance, owing to the delay, he could not take into consideration the *insufficiency* (properly so called) of the affidavit.

Note.—For the forms of summons, see
Tripp's Chancery Forms, 161.

Wood, V.-C. } *HINDE v. MORTON.*
10, 11 FEB. 1865. }

Abatement—Motion to Dismiss—Revivor.

In an administration suit by two residuary legatees, as co-plaintiffs, if one die before replication, the proper course is to mark him as dead, and when the cause comes into Chambers, to serve his representatives with the decree.

One of two co-plaintiffs, who, as residuary legatees, had instituted an administration suit, died after the bill had been filed. On the 15th of November, 1864, the defendants gave notice of motion to dismiss, for want of prosecution.

On hearing the motion, an objection was taken, that the notice should have been for the surviving plaintiff to revive within fourteen days, or, &c.; and the plaintiff's counsel indorsed his brief, "The usual order." The Registrar drew up minutes of the usual order in case of abatement by the death of a co-plaintiff, that the surviving plaintiff do revive, &c. The minutes of the order were silent as to the costs of the motion, the Registrar being of opinion that it was not the practice of the Court, in such a case, to direct the plaintiff to pay to the defendants their costs of the motion.

The defendants now moved, on a fresh notice of motion, to the effect that the order made on the 28th of November might direct the plaintiff, within fourteen days from the service of the order, to file replication, or serve notice of motion for decree, and in default, the bill to stand dismissed with costs, and that the plaintiff be ordered to pay the defendants their costs of the motion.

Jessel, in support of the motion, argued, that there was no abatement, or only so partial a one (the interest surviving in the other plaintiff), as to create no defect in parties,

Mitf. on Pl. p. 70.

The present suit was like one by two creditors. As there was a valid plaintiff, and he was in default, the defendant ought to have his costs of the motion. He cited,

Lever v. Heritage, 5 Jur. (N. S.) 215;

Boddy v. Kent, 1 Mer. 361;

Chichester v. Hunter, 3 Beav. 491.

W. W. Cooper, argued, *contra*, that there was an abatement, and it was necessary that the suit should be revived, before any further steps could be taken.

Jessel, in reply, cited,

Adamson v. Hull, Turn. & Russ. 258.

WOOD, V.-C., stated that the usual order was, that if the plaintiff fail to file replication, &c., within a limited time, the bill should be dismissed. If it was necessary to revive, then the usual order was, that the surviving plaintiff (one of two co-plaintiffs having died) revive the suit within fourteen days from service of the order, or in default that the bill stand dismissed with costs, but that there would be no costs of the motion itself, unless some special circumstances occurred. On the question, whether or not it was necessary to revive, there had been a decision by the Master of the Rolls, *Smith v. Horsfall* (24 Beav. 331), that notwithstanding the new course of procedure, 15 & 16 Vict. c. 86, there was an abatement in a case like the present. But the point was not then much discussed. That decision was, however, followed by Vice-Chancellor Kindersley, in *Ure v. Lord* (13 W. R. 41), after some hesitation.

His Honour distinguished the case of a residuary legatee from that cited by Mr. *Jessel* as to creditors.

suits, for a residuary legatee does not file his bill on behalf of all other the residuary legatees as well as of himself. He thought, however, that there was no abatement. The suit could proceed to the hearing, and after the hearing it would become necessary to mark the death of the co-plaintiff. Otherwise the Chief Clerk might assume him to be alive, and not know that he should serve his representatives with the decree. His Honour thought that he ought not, in the present instance, to fix the surviving plaintiff with costs. In future the course would be to mark the co-plaintiff as dead, and when the cause came into Chambers, to serve his representatives with the decree.

Wood, V.-C. } Re W —.
15, 16 JAN., 13 FEB. 1865.

*Custody of Infants—Conduct of Parent—
2 & 3 Vict. c. 54.*

The Court has no right to interfere with the course adopted for the education of an infant of tender years by a father who has not misconducted himself.

Accordingly, where a husband and wife had been separated through the misconduct of the wife only, her petition for access to her infant child was dismissed, the Court being of opinion that such access would interfere with the course of education approved of by the father.

This was a petition by a mother under "Talfourd's Act," 2 & 3 Vict. c. 54, to have access to her child, a girl aged eight and a half years, the sole offspring of the marriage, in such manner as the Court should direct. It appeared from the evidence, that in early youth, soon after her marriage, Mrs. W., the petitioner, had committed adultery, and that, upon her confession, she had been pardoned by her husband, Colonel W. Some time afterwards, in 1856, the child was born. In 1860, an intimacy sprung up between her and a Lieutenant A., a brother officer of her husband. On this coming to her husband's knowledge, he, with the assistance of his friends, investigated the circumstances, and came to the conclusion that she had not committed adultery. At the same time he also came to the conclusion, that it would be for the advantage of himself and his wife that there should be a temporary separation. This was acquiesced in by Mrs. W., and in 1861, she being then in India with her husband and child, left her husband for the purpose of proceeding to England with the child. A correspondence thereupon took place between the husband and wife, during the early part of which there was a hope expressed on his part for a reconciliation, and of her having, during their absence from him, the charge of the daughter.

After a time his views, mainly through the representations of his own family, became changed, and he desired that the daughter should be placed under the charge of his own mother and sister; a course which

was extremely objectionable to his wife. In obedience to her husband's wishes, Mrs. W. placed her daughter under the charge of her husband's mother and sister, and had only once since that time, and then under an order of the Divorce Court, been allowed to see her.

In 1863, the husband guided in part by the advice and recommendation of his own family, filed his petition for a divorce. Judgment was given in the wife's favour on the 9th of February, 1864. The three months allowed by the practice of the Divorce Court for lodging an appeal, expired on the 9th of May, 1864. On the 10th of May, Colonel W. took his child out of the jurisdiction, where she has ever since resided. On the 28th of May, this petition was filed by the mother, and in July an order was made by Stuart, V.-C., that she should have access to the infant. This order was reversed by the Lords Justices in the same month, on the ground that time had not been afforded to Colonel W., who had returned to his regiment in India, to file an affidavit. Colonel W. had since filed an affidavit, and at the request of Stuart, V.-C., who declined to rehear the case, and at the request of the Lords Justices, the petition was heard before Wood, V.-C. Colonel W. had not withdrawn his support from his wife, and partly from pecuniary motives with a view to economy, was desirous that the child should be educated abroad under the superintendence of his sister.

Bagshawe, for the petitioner.

Daniel, Q.C., and Morgan, contra, cited,
Warde v. Warde, 2 Ph. 785;
Re Tayler, 11 Sim. 178, 200.

13 FEB. 1865.

WOOD, V.-C., after referring to the observations of Lord Cottenham in the case of *Warde v. Warde* (*loc. cit.*), said, that any order of access that he might make, would necessarily have reference to the fact of the child's being resident abroad. That it would be quite out of the question to order the child to be brought over to this country, when the father had said that it was necessary for his resources that the child should be educated abroad; and that the present was not a case in which, according to Lord Cottenham's view, the Court was called upon for any interference whatever, for here the mother required no protection from the tyranny of the father. He had treated her with the utmost indulgence, and was not withdrawing the child for the purpose of hurting the mother's feelings; his sole motive appeared to be to bring up the child in the best way in which he could under the painful circumstances of the case.

Colonel W. had said, in his affidavit, that he wished the child to be brought up tranquilly, without being excited with interviews with her mother, under the present painful circumstances, until it should be old enough to be informed of what had occurred, and her

own position. There was another difficulty arising from the fact that those who were educating the child with the father's sanction held views on education antagonistic to those of the mother; and it would be a great peril to so young a child to have the conflict in its mind, as to whom it was to obey; a consequence which must arise, if the mother were to have access to it. The Court had no right, so long as a father's conduct was free from all question of bad motive, to form any opinion whether he was or was not judicious in wishing the child to undergo a particular course of education. In this case, the mother herself, speaking of her reluctance to have the child placed with her husband's sister, made use of these observations in a letter to her husband:—"My child is now given over to your sister to educate, and there cannot be two mistresses. If I live there, my darling would naturally come to me. She would come to me to help her in her little troubles, and she might be, very justly perhaps, corrected by your sister. I might not be able to see the justice of it. Even if I did, I could not help my mother's feelings taking my child's part. Again, there are several things

she might be subjected to, which, even in thought, I could not bear to witness without feeling angry, discontented, or speaking out what I did feel." Then she said, "That is a course which would probably give offence. It would be reported to you. I should not, perhaps, quite accord with you, and the breach be made wider."

If the Court were to give only occasional access, it would be torturing both mother and child, and, if it were to grant frequent access, such a step would clearly lead to altercation between Mrs. W. and those under whose care the child was placed, which would be very bad for the child. If Mrs. W. had behaved so that she and her husband could now be living together, she would have been in India with him, and would have had to endure separation from her child, who would have been sent home to Europe for education; and she would have been unable in that case to have interfered with the child's education, and ought not to be permitted to do so, when the fact that she was in Europe at all was owing to her own misconduct.

The petition must be dismissed; but, with the consent of the husband, without costs.

COMMON LAW.

Q. B.
13, 28 JAN. 1865.

BILLS and Others, Assignees,
&c., of WILLIAM SMITH v.
CHARLES SMITH.

Bankrupt—Creditor—Fraudulent Preference.

A payment to a particular creditor without a demand made by a debtor, on the eve of bankruptcy, out of a fund which would otherwise be distributable among his creditors, is not necessarily a fraudulent preference; for though such a payment would prima facie raise the presumption that the debtor fraudulently intended to defeat the Bankrupt Law, from which fraudulent intention alone arises the invalidity of the payment, yet that presumption may be rebutted by other circumstances.

The question turns entirely on the motive of the debtor in making the payment. Therefore in an action by the assignees of a bankrupt to recover a sum alleged to be paid by him by way of fraudulent preference, the jury were rightly directed, that although the payment was apparently voluntary, yet if the evidence satisfied them that the debtor's motive was not to give a fraudulent preference, but to fulfil an obligation which he believed to be peremptory, the payment was legal and valid, as against the assignees. In such a case all these circumstances must be left to the jury, and they should be told, that unless they come to the conclusion that the debtor had the intention of defeating the law, and preventing

the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction will stand good in law.

Action by the assignees of a bankrupt to recover a sum of 500*l.* repaid by the bankrupt, as the plaintiffs alleged, in contemplation of bankruptcy, by way of fraudulent preference, to the defendant who had previously lent the bankrupt 500*l.* Verdict for the defendant. The facts are fully stated in the judgment. *Hayes, Serjt.*, having previously obtained a rule nisi for a new trial, on the ground that Blackburn, J., misdirected the jury, that "notwithstanding there was no pressure or application for the payment by the defendant, if the bankrupt did not pay the money with intent to prefer the defendant, but in pursuance of, and in order to fulfil his contract when the money was borrowed, it would not be a voluntary preference."

Macaulay, Q.C., and *Fitzjames Stephen*, now showed cause.

The Judge was right. The money would not have been lent without an express contract to repay on 1st July. In one sense no act is voluntary; in another every act is: the question is, what was the class of motive, and the jury have virtually found the motive was to keep the contract. An actual demand need not be made.

[BLACKBURN, J.—No doubt if the money had not

been repaid on 1st July, a demand would have been made. In fact, something was said a few days before to the effect that it would be then paid, which no doubt would have the effect of preventing a demand being made.]

Harman v. Fisher, 1 Cowp. 117 ;

Vacher v. Cocks, 1 B. & Ad. 152, *per* Bayley, J. ;

Hunt v. Mortimer, 10 B. & C. 44.

Had the bankrupt any intention to defeat the bankruptcy laws?

[BLACKBURN, J.—Is not the rule this, that if a payment is made spontaneously when bankruptcy is impending, there is a fraudulent preference, because a man must be taken to have intended the natural consequence of his own acts?]

[CROMPTON, J.—See *Gibbins v. Phillips*, 7 B. & C. 529.]

This act was not voluntary,

Strachan v. Barton, 11 Exch. 650 ;

Abell v. Daniell, 1 Moo. & Mal. 370 ;

Gibson v. Boutts, 3 Scott, 229 ;

Cook v. Rogers, 7 Bing. 438.

If the other side are right, every payment made by the bankrupt in the course of business must be set aside.

Hayes, Serjt., and *Alfred Wills* in support.

The act being spontaneous, is *prima facie* evidence of fraud.

[BLACKBURN, J.—But see *Crosby v. Crouch*, 11 East. 256.]

Alderson v. Temple, 4 Burr. 2240 ;

Hartshorn v. Slodden, 2 Bos. & Pul. 582 ;

Thompson v. Freeman, 1 T. R. 155.

In all these cases there was pressure.

[BLACKBURN, J.—Is there any case where the payment was held to be a voluntary preference, though there was a bargain to repay on a day fixed?]

The contract does not make the payment less voluntary ; if so, no payment of a bill or promissory note could be voluntary,

Edwards v. Glyn, 28 L. J. Q. B. 350 ;

Brown v. Kempton, 19 L. J. C. P. 169.

The defendant ought to show that there is something to take it out of the category of spontaneous acts ; something “to control the will of the debtor.”

[CROMPTON, J.—A man might say, “The more you press me, the less I ought to pay.”]

Cur. adv. vult.

28 JAN. 1865.

COCKBURN, C.J., delivered the written judgment of himself, and of CROMPTON, BLACKBURN, and MELLOR, JJ. :—

This was an action by the assignees of William Smith, a bankrupt, to recover back a sum of money paid to the defendant, as it was alleged by way of fraudulent preference. On the trial, evidence was given that William Smith became a bankrupt on the 24th of September, 1862. Before his bankruptcy, and at the end of April, 1862, he had applied to the

defendant, Charles Smith, who was his brother, for a loan of money. Charles Smith, according to the evidence, which the jury must be taken to have believed, told him that he had not the money, but that he thought he could procure it from his bankers, on pledging himself to repay it on a particular day, and he asked his brother William when he would be able to repay the money, and was told on the 1st of July then next. The defendant then went to his bankers, and obtained from them an advance of the sum required on the deposit of some title deeds, on the express contract that he, the defendant, would repay the money on the 1st of July. He returned to William Smith, and informed him of the terms on which he had obtained the money, and the money was lent by the defendant to William Smith on the 29th of April, on the security of a promissory note payable on demand. A few days before the 1st of July, the brothers again met, when William Smith, without any fresh application, told the defendant that he should be prepared to pay him on the 1st of July, and requested to know the amount of the bankers' commission, and other charges, that he might pay the whole sum at once. He was told what they were, and on the 1st of July, without any further application, brought the money to the defendant, and paid him. William Smith was in good general credit till some time after this payment, but the fact was, that he was, during the whole period of this transaction, and had long been, in very embarrassed circumstances, and the money he thus obtained was wanted to pay off a creditor then pressing him for payment. But the defendant was not at all aware of these facts, and it was admitted at the trial that the whole transaction was perfectly *bona fide* on his part. The evidence showed that the affairs of William Smith continued to get worse, and that on the 1st of July they had become hopeless. On the 22nd of August he issued a circular to his creditors, and on the 22nd of September became a bankrupt. It was left to the jury as a question of fact, whether at the time of the payment to the defendant bankruptcy was contemplated by William Smith, and they were told that if the payment was in contemplation of bankruptcy, and voluntary, they ought to infer that it was intended to prevent the equal distribution of the property amongst the general creditors, in which case it would be void as against the assignees. So far no complaint is made of the direction, but my Brother Blackburn, who tried the cause, further told the jury that if the bankrupt, though he was aware that bankruptcy was unavoidable, and though no application had been made for payment, paid this debt simply in discharge of the obligation he had entered into to pay on a given day, without any view of giving a preference to this particular creditor at the expense of the rest, the payment would not be a fraudulent preference within the meaning of the Bankrupt Law. The jury having found for the defendant, we must take it as a fact that the payment was made by the bank-

rupt *bona fide*, and without any intention of giving an undue preference to the defendant. And the question is whether the direction of the learned Judge to the jury was wrong in telling them that a payment made under such circumstances was good as against the assignees on bankruptcy supervening.

On the part of the plaintiffs it was contended that the payment having been made by the bankrupt without any application from the defendant, must be taken to have been purely voluntary on his part, and it was urged that as the effect of such payment must necessarily be to prevent the rateable distribution of his effects among his creditors, and so to defeat the Bankrupt Law, and as a man must be taken to intend that which is the necessary consequence of his acts, a payment made spontaneously by a debtor on the eve of bankruptcy must necessarily be a fraudulent preference. The cases were also relied upon in which the question discussed had been, whether the payment had been made voluntarily or on the demand of the creditor; and the language of the Judges in pointing out this distinction as the criterion of the validity of the payment was also adverted to, as showing that the absence of any demand by the creditor must be considered conclusive of the payment being a fraudulent preference. In effect, the argument for the plaintiffs came to this, that no payment made by a debtor on the eve of bankruptcy out of a fund which would otherwise be distributable among his creditors without a demand from the particular creditor would be other than a fraudulent preference. We are unable to assent to this proposition. There is no doubt that in the great majority of cases the question of fraudulent preference would be determined by the fact of the payment having been made spontaneously by the debtor without pressure on the part of the creditor. Unexplained, a payment so made would carry with it the presumption that the intention of the debtor was to act in fraud of the Bankrupt Law. Hence the importance of requiring proof of pressure on the part of the creditor in order to rebut the inference which would otherwise arise from the apparent spontaneity of the act, and hence the language of the Judges in the cases referred to in distinguishing between a voluntary payment and one made on the pressure of the creditor. But it by no means follows that, because in the majority of cases the absence of pressure by the creditor may properly lead to the inference that the debtor intended to act in fraud of the law, that circumstance must necessarily be conclusive in a case where other circumstances are found sufficient to rebut the presumption of fraudulent intention. For it must be borne in mind that the true question in all these cases is, whether the intention with which the payment was made was to defeat the operation of the bankrupt law. It is this intention to act in fraud of the law which stamps the preference of the particular creditor, however morally honest, with the character of fraud.

It may not be unimportant to observe how the law as to fraudulent preference has arisen. The statutes relating to bankruptcy contained no provision invalidating payments made prior to the Act of Bankruptcy, but the Courts from the time of Lord Mansfield held that if a trader in contemplation of bankruptcy, with a view to evade the Bankrupt Law, preferred a particular creditor to the detriment of the rest, such a preference was a fraud upon the law, and the transaction could not stand. Lord Ellenborough, in *Crosby v. Crouch* (2 Campb. 168) says, that this was "an excess on the bankrupt laws," and that, in his opinion, the cases had gone far enough, and ought not to be farther extended. Be this as it may, the intention of the party making the payment to defeat the law was always considered as the cardinal point on which the whole question turned. "Where an act is done which is right to be done," says Lord Mansfield in *Harmes v. Fisher* (1 Cowp. 123), by which, of course, he means "right" irrespectively of the Bankrupt Law, "and the single motive is not to give an unjust preference, the creditor will have a preference." "A bankrupt," says Heath J., in *Hartshorn v. Slodden* (2 B. & P. 585), "has the disposition of his property till the moment when he commits an act of bankruptcy; and unless he dispose of it *in fraudem legis*, his transfer will be good. Fraud changes the complexion of things both in civil and criminal cases." It is with reference to the intention and motives of the party making the payment that the fact of threats or importunity on the part of the creditor becomes, in the majority of cases, a matter of so much importance. Not, indeed, that the hostile attitude of the creditor will of itself legalise the payment if the debtor was uninfluenced thereby, and the payment was made voluntarily by the debtor, and with a view to prejudice his other creditors. *Oak v. Rogers* (*loc. cit.*). The pressure of the creditor becomes material, because, as is said by Lord Ellenborough in *Crosby v. Crouch* (*loc. cit.*), "his demand repels the presumption that the bankrupt on the eve of bankruptcy made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest." The pressure of the particular creditor does not make the payment any the less contrary to the policy of the Bankrupt Law, which seeks to insure the rateable distribution of the insolvent trader's assets, but which distribution is defeated by the payment to the single creditor whether importunate or not. Neither can it be said that the pressure operates to compel payment by the debtor; for the latter, if he knows that bankruptcy is inevitable, must also know that it will protect his property and his person against the individual creditor. The effect of pressure, therefore, in legalising the payment is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction. But if the fact of pressure by the creditor only operates in the way pointed out, why may not

any other circumstance which in like manner would serve to repel the presumption of fraudulent intention be available for this purpose? The question whether an intention to defeat the law, and to prevent the due distribution of his assets, existed in the mind of the trader in handing over the portion of them in question to the creditor, is one of fact for the jury. If the act was spontaneous on the part of the debtor, and there are no circumstances to rebut the presumption which arises from the act having been purely voluntary on his part, the jury should be told to infer that the preference thus given was fraudulent and wrongful. But if there are circumstances by which the presumption may be rebutted, these circumstances, whatever they may be, are for the consideration of the jury, and cannot properly be withdrawn from them; and a direction to the jury, that although the transaction was apparently voluntary on the part of the debtor, if the effect of the evidence on their minds is to satisfy them, that the desire to give a fraudulent preference was not the motive operating on the debtor in handing over his assets to the particular creditor, they ought to uphold the transaction, is, in our opinion, perfectly correct.

In the present case we must take it on the finding of the jury that the motive operating on the mind of the debtor was his sense of the obligation arising from the undertaking to return the money on the appointed day. We are not called upon to say whether we approve of the verdict of the jury, or whether it would not have been more satisfactory if the jury, looking to the desperate pecuniary position of the debtor and the near relationship of the parties, and to the absence of any demand of payment, had come to a different conclusion as to the motive of the payment. We have only to deal with the direction of the learned Judge, that if the desire to fulfil an undertaking believed to be peremptory was the motive of the debtor, the payment would be legal and valid. The present case, no doubt, does not fall within the principle of *Toovey v. Milne*, (2 B. & A. 683) and cases of that class, in which it having been agreed that a fund should be specifically appropriated to a particular purpose, as Equity would enforce the specific application, the money would not pass to the assignees. In the present case the agreement was not to pay out of a particular fund, but to pay on a particular day, and the payment was made accordingly. But there is authority for holding that where money is paid under a special contract for repayment made when the money was lent, this will not amount to fraudulent preference. In *Hunt v. Mortimer* (*loc. cit.*) where a trader in insolvent circumstances having an order from the East India Company which he had not funds to execute, borrowed money on an agreement that the lender should receive the money for the order and repay himself, and this was accordingly done; this Court upheld the transaction as not amounting to a fraudulent preference: Parke J., it is true, puts it upon the principle of the fund being bound in Equity

to the specific appropriation, but Lord Tenterden and Bayley and Littledale JJ., appear to have proceeded on the more general ground. Littledale, J., expressly says, that a payment is not voluntary if it is the subject of a special contract made before the money was lent. In *Vacher v. Cocks* (*loc. cit.*), in which case an army agent on receiving credit from his bankers, the defendants, engaged to pay over to them on receipt, sums which usually came to his hands half-yearly from Government for the discharge of pensions, and paid them accordingly, Lord Tenterden, at Nisi Prius, directed the jury that if the payments were made in pursuance of an antecedent contract entered into on opening the new account, or with a view to enable the bankers to honour the bankrupt's drafts that he might go on for a time, then to find for the defendants; whereupon the counsel for the plaintiffs elected to be nonsuited. A rule to set aside the nonsuit having been obtained, the Court held that, as the direction was admitted to be right on the second point, the nonsuit must stand, so that it became unnecessary to decide whether the direction on the first point was right. But Bayley, J., expresses his opinion that the questions left to the jury were both proper. His language appears very much to the present purpose. He says, "the question of fraudulent preference depends on what passes in the mind of the party making the payments at the time they are made; if he acts in pursuance of a contract, or engagement, or otherwise, under such circumstances that he cannot have a choice, the payments are evidently not the result of preference." Littledale, J. appears to have concurred in this view, though Parke, J., expresses doubts as to the direction on the first point, and appears to have thought it incorrect. In another case of *Abell v. Daniel*, where a sum of money had been given by a trader shortly before his bankruptcy to his son, whom he was in the habit of maintaining, Lord Tenterden left it to the jury to say whether the money was given in the ordinary course of maintaining the son, or for the purpose of securing an advantage to the latter over the creditors, and with a view to benefit him at their expense. This it is true amounts to no more than a ruling at Nisi Prius, but the ruling does not appear to have been questioned. In our opinion, founded both on the reason of the thing, and on the result of the authorities, the whole question turns on the intention of the trader in disposing of his effects to the particular creditor. *Prima facie*, a trader, who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law; but, if circumstances exist which tend to explain and give a different character to the transaction, and to show that the debtor acted from a different motive, these circumstances must be left to the jury, who should be told that unless they come to the conclusion that the debtor had the intention of defeating the law and preventing the due distribution of his

assets by preferring one creditor at the expense of the rest, the transaction will stand good in law. This, it appears to us, was in substance and effect the direction of my Brother Blackburn to the jury. We therefore hold that the direction was right, and consequently that this rule must be discharged.

Rule discharged.

C. P. } STACEY, Appellant, v.
25 JAN. 1865. } WHITEHURST, Respondent.

Trespass in pursuit of Game—Aiding and Abetting—Evidence—11 & 12 Vict. c. 43, s. 5.

A and B were driving along a turnpike road in a trap, on their way to shoot on their sister's land. A stopped the trap, and B got out, went on to some land adjoining the road, shot a hare, brought it back, and gave it to A, who remained in the trap. B was convicted before Justices of trespassing in pursuit of game:—

Held, that there was ample evidence for the Justices to convict A on an information, charging him under 11 & 12 Vict. c. 43, s. 5, with "aiding and abetting B to commit the said offence."

Case, stated by Justices under 20 & 21 Vict. c. 43.

At a Petty Sessions holden at Cruckton, in the county of Salop, an information was preferred by the appellant against Thomas Whitehurst the respondent, under 11 & 12 Vict. c. 43, s. 5, charging that John Whitehurst, on the 11th of October, 1864, at the parish of Pontesbury, in the county aforesaid, did unlawfully commit a certain trespass, by entering, and being in the day time of the same day upon a certain piece of land therein described, in pursuit of game, without the consent of the owner, &c.; and that the respondent was then and there present aiding and abetting the said John Whitehurst to do and commit the said offence.

The said John Whitehurst was before the hearing of the said information, convicted of the trespass, and fined.

Upon the hearing, it was proved for the appellant, that on the day, and at the place above mentioned, the said John Whitehurst and the respondent, were passing along the turnpike road in a trap on their way to shoot on some land belonging to their sister, and that when near the place where the alleged trespass was committed, the trap, which was driven by the respondent, was stopped, and that the said John Whitehurst got out of the trap, and entered a field in the occupation of Mr. Jones, with a gun and a dog, and shot a hare, which he picked up, and on returning into the turnpike road (where the trap had stopped for a minute or so) gave the hare to the respondent, according to the evidence of two witnesses who were at the distance of 100 yards, and a quarter of a mile respectively. The respondent then drove on along the road, and the said John Whitehurst walked

about five or six yards behind the trap to a public-house a short distance off.

It was contended on the part of the respondent, that he was not an aider and abettor in the trespass, inasmuch as he was passing along the turnpike road for a lawful purpose on his way to shoot on his sister's land (which was not denied or questioned), and that he was not there for the purpose of aiding and abetting in the commission of the trespass, and that not having left the trap, he could not be an aider and abettor; and that as soon as the said John Whitehurst returned into the said turnpike road, the trespass had been committed and completed.

The magistrates, being doubtful, whether, upon the evidence given before them, the respondent was in law an aider and abettor, thought it right to dismiss the case as against the said respondent.

A copy of the depositions formed part of the case. The questions of law for the Court were:—

1st. Whether the respondent was an aider and abettor in the commission of the trespass within the meaning of the said Act, 11 & 12 Vict. c. 43, s. 5.

2nd. Whether the said dismissal was valid, or otherwise.

Henry James, for the appellant, was stopped.

Raymond, for the respondent, referred to the proviso in 1 & 2 Will. 4, c. 32, s. 30, enabling any person charged with a trespass under that Act "to prove, by way of defence, any matter which would have been a defence to an action of law for such trespass," and contended that here a declaration against the respondent would fail, if it charged him with the trespass as an aider and abettor, and not as a principal.

The appellant relies on 11 & 12 Vict. c. 43, s. 5, as creating the offence. But that statute does not create an offence, but only provides, as to procedure, for convictions independently of principal offenders.

[WILLIAMS, J.—You say "aiding and abetting" is not an averment that the respondent was trespassing.]

Yes. See,

Regina v. Scotton, 5 Q. B. 493.

ERLE, C.J.—We think the case should be sent back to the magistrates. The Court has no power to draw inferences of fact. The question of law is, whether there is any evidence upon which, according to law, the magistrates might have found the respondent guilty. I think there was abundant evidence upon which they might have done so, and that the case should be sent back, to see whether they draw the inference of fact which we suggest, but which we do not call upon them to draw. If they come to the conclusion that both were engaged in a common purpose, then, on the charge of aiding and abetting, they may find the respondent guilty. We need not go into the question, whether he is guilty within the 11 & 12 Vict. c. 43, s. 5.

WILLIAMS, J.—I am of the same opinion. The

magistrates seem to have thought that, in point of law, there was no evidence of the commission of the offence imputed by the information. But I think it is clear that there was evidence of "aiding and abetting," though the respondent might have been convicted as a principal in the second degree.

WILLES, J.—As to the 11 & 12 Vict. c. 43, s. 5, that is an Act to facilitate procedure in the case of accessories, and it is only necessary to refer to it where there is a distinction between a principal and an accessory. I think it would have been better if the information had charged the respondent as a principal. But except where words of art, as *felonice*, *burglariter*, &c., are used, it is sufficient in declarations and informations to describe the cause of action or the offence in language which, if proved, amounts to an irresistible conclusion that the injury has been done, or the offence committed.

KEATING, J.—I am of the same opinion. The difficulty which the magistrates seem to have had arose from the objection taken before them, that, as the respondent never left the vehicle, the offence was completed before he had anything to do with it. And the question for us is, how far the subsequent acts may go to show the respondent's participation in the offence. I think there was quite enough evidence for a conviction. It would have been more artificial to charge the offence under the Game Act (1 & 2 Will. 4, c. 32), but I think the Justices may find him guilty on this information, though they may still find either way.

Judgment for the appellant.

C. P. } WHYMPER, Appellant, v.
25 JAN. 1865. } HARNEY, Respondent.

*Factory Acts—What "a Factory" within—
7 & 8 Vict. c. 15, s. 73—Crinoline Manufacture.*

It was the owner of premises in which he carried on the manufacture of crinoline, and wherein steam was used (amongst other purposes) to work a plaiting machine, which plaited sixteen threads of cotton together round strips of steel:—

Held, that these were premises "wherein steam was used to work machinery employed in manufacturing or in a process incident to the manufacture of a fabric made of cotton," so as to be "a factory" within 7 & 8 Vict. c. 15, s. 73.

Case stated under 20 & 21 Vict. c. 43, to the following effect:—

On October 14, 1864, the respondent appeared before Justices of Petty Sessions for the borough of Sheffield to answer a summons issued on the complaint of the appellant (the Sub-Inspector of Factories) charging that he, the respondent, had offended against the Act 18 & 14 Vict. c. 54, "to amend the Acts relating to labour in factories," forasmuch as he,

the respondent, on the 26th of August last, at the parish and borough of Sheffield, did unlawfully employ a female above the age of eighteen years, named Charlotte Roxburgh, in the factory of him, the respondent, after six o'clock in the evening of the said day, to wit, at thirty minutes past the said hour, and not to recover lost time as provided by the said Act. The respondent was the occupier of premises in Granville Street in Sheffield, in which he carried on the trade of a manufacturer of crinoline steel, crinoline skirts, &c., &c. There was a steam-engine on the premises, the power of which was employed to move and work machinery in three rooms used in cutting steel into strips, and working and preparing such strips as hereinafter described, and also in wrapping or covering the strips of steel with cotton-thread as hereinafter described. There were four other rooms in the premises in which by-hand sewing-machines were used, steel strips inserted into skirts, and the skirts finished for market. The course of manufacturing crinoline steel was, that the respondent purchased of the steel manufacturers sheets of steel rolled very thin, about three inches in width, and about fifty feet in length, which sheets were cut by circular shears into strips of from one inch to three-sixteenths of an inch in width: these strips were then riveted together by the ends 'in lengths of 1000 yards, or thereabouts, and reeled or wound into coils of about eighty lbs. each. The coils were then unwound, and as the strip of steel passed along it was exposed to the influence of heat, then to that of oil, or passed over or between chilled dies or plates of cold steel: by this operation the steel strips were hardened, and being again heated, became properly tempered. They were then ground or polished and blued in a finished state, and were then again reeled or measured out into coils of thirty-six, seventy-two, or 144 yards each. In this process women were employed. Some portions of such coils were sold or used up into skirts without undergoing any other process than has been described, but other portions were previously wrapped or covered with cotton-thread. This cotton-thread was invariably purchased by respondent from spinners or their agents, in hanks or bundles, which on the respondent's premises underwent no further manufacturing process; but by means of steam power were wound or reeled upon bobbins of various sizes for more convenient application around or about the strips of steel. One process of such application was effected by a machine called a wrapping-machine, which by steam power turned the cotton-thread in single file round and round the strips of steel, as appeared by the sample produced marked A. The other process or application of the cotton-thread was effected by a machine called a plaiting-machine, which by steam power effected a covering for the steel by the interlacing or plaiting of sixteen threads together round and over every part of the strips, as appeared from the sample produced marked B. In the process of cover-

ing the steel with cotton, as above described, by steam power, women were employed. The whole of the rooms and premises were within one boundary or curtilage. On the hearing of the complaint, the appellant proved that on the 26th of August last, he went to the works of the respondent in Granville Street, between 6.30 and 6.45 p.m., and on going upstairs he found in a first room a number of girls and young women standing in an opening on one side of the room, which he could best describe as resembling the bar of an inn. The persons were in the act of delivering their work to a woman inside an apartment where the skirts were received after they were made. Charlotte Roxburgh was at the bar, delivering or passing over skirts. That he, the appellant, proceeded into a further room and there, seated on benches by the side of long tables, found a second and larger number of females occupied in making up crinoline-skirts. That two male assistants of the respondent were present, and he pointed out to them what he conceived to be the illegality of the proceedings. That the rooms in which the young women were working were within the outer gate and the boundary walls of the premises where the steam power is applied. That some of the young women were employed in inserting or securing the covered steel into crinoline-skirts. On cross-examination, appellant stated that he saw no machinery in the two rooms, and that the young women could have done the work they were doing just as well at their own homes. That the respondent was what is termed a crinoline manufacturer. That the skirts referred to were composed of gores cut from pieces of calico, nets, or plain or coloured cloths, and sewed together, into the folds or hems of which the strips of steel were run or inserted, and so the articles were formed into the female garment or appendage called a crinoline-skirt.

On the above facts, the Justices were of opinion that the respondent's premises were not, and could not be called, in the ordinary use of words, a cotton-mill, and did not become a cotton-mill or factory within the intent of the 3 & 4 Will. 4, c. 103, by reason of the application of the steam-power to machinery used therein for manufacturing steel and cotton-thread, and other materials, into crinoline, by the means and in manner above described. Also, that on such premises, and for such a purpose, the process of wrapping or covering by machinery crinoline steel with cotton-thread, was not, within the meaning of the 7 & 8 Vict. c. 15, s. 73, a process incident in any way to the manufacture of cotton, or to any fabric made thereof or mixed therewith; but was incident to the manufacture of crinoline, in like manner as the covering or wrapping of driving or riding-whips, if effected by machines of the same character, with silk-twist or strong linen-thread, and other materials, is not a process incident to the manufacture of silk or linen, or to any fabric made thereof; but would be a process incident to the making of whips.

The summons was, therefore, dismissed, subject to the present case for the opinion of the Court, as to whether the determination of the Justices was or was not correct.

The words used in 3 & 4 Will. 4, c. 103, s. 1, in describing a factory, to which the provisions of the Factory Acts are to be applicable, are as follows: "Any cotton, woollen, worsted, hemp, flax, tow, linen, or silk-mill or factory, wherein steam or water, or any other mechanical power, is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piercing, twisting, winding, throwing, doubling, netting, making thread, dressing or weaving of cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory, situate in any part of the United Kingdom."

The material part of the 7 & 8 Vict. c. 15, s. 73, referred to in the case, is as follows: "That, unless another sense shall be plainly shown by the context, or by some positive enactment to the contrary, the word 'factory' . . . shall be taken to mean all buildings and premises situated within any part of the United Kingdom . . . wherein, or within the close or curtilage of which, steam, water, or any other mechanical power, shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof; and any room situated within the outer gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory, shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this Act; but this enactment shall not extend to any part of such factory used solely for the purpose of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material than those herein enumerated."

The Act under which the offence was charged (the 13 & 14 Vict. c. 64) extended the provisions of the former Acts, to cases in which girls above the age of eighteen were engaged.

Hannen (The Solicitor-General with him), for the appellant.

If this is a factory, the respondent was liable to a conviction under the Factory Acts, for the room in question was not "a part used solely for the manufacture of goods made entirely of any other material than those enumerated," within the exception in 7 & 8 Vict. c. 15, s. 73.

And 1st. This is a cotton-mill or factory within 3 & 4 Will. 4, c. 103, s. 1. For steam is used therein to work the machinery therein in twisting and winding cotton (see sample A).

2nd. It is a factory within 7 & 8 Vict. c. 15, s. 73. For steam is used therein to work machinery employed in manufacturing or in a process incident to the manufacture of cotton mixed with another material or a fabric made thereof (see sample B).

Sample B produced, is a complete fabric of steel and cotton. If the covering were made separately as a cotton bag, it would be a fabric. Why not, when made round the steel? He cited,

Taylor v. Hickes, 31 L. J. M. C. 242;

Haydon v. Taylor, 33 L. J. M. C. 30.

Quain, for the respondent.

These are penal statutes of a very stringent character, and are the first great interference with trade; so they must be construed strictly.

[His first point, viz., that the 13 & 14 Vict. c. 54, only prohibited work for more than twelve hours, and that here it only appeared that the respondent had kept the girl at work *after six*, was at once held untenable.]

This is not a factory either in the ordinary meaning of the word or within either of the Acts referred to; whose sole object was to regulate the manufacture of fibrous material, mixed or not with other materials. Here the cotton is bought, and not manufactured. Nor is it mixed with the steel, but wound round it, as in the case put by the Justices, of cotton wound round a whiphandle. Cotton combined with steel is not the same as cotton mixed with steel.

[KEATING, J.—In sample B, the product is cotton plaited, not wound round steel. That would be a fabric if made separately as a bag for the steel. Why not, if made on the steel at once?]

He cited,

Coles v. Dickenson, 16 C. B. (N. S.) 604; 33 L. J. M. C. 235.

Hannen replied.

ERLE, C.J.—The question in this case is, whether the premises of the respondent are shown on these facts to be a factory “wherein steam is used to work machinery employed in manufacturing, or in any process incident to the manufacture of cotton, either separately or mixed with any other material, or any fabric made thereof,” within 7 & 8 Vict. c. 15, s. 73. I think this is a factory within the Act.

Two samples are produced, one (marked A), in which the cotton is wound round the steel, the other (B), in which sixteen threads of cotton are plaited together round the steel. I think the fabric composed of a plait of sixteen threads is a fabric of cotton (“thereof”) within the statute. The case put by my Brother Keating during the argument is conclusive. Suppose a cotton manufactory employed to make the materials which shall be afterwards useful to crinoline makers, and, amongst others, bags or cases for the steel, such as this is. That would be a fabric of cotton. And I do not see why it should not be so,

merely because it is made and put on to the steel at one and the same time. I think, therefore, that this is a factory within the meaning of the statute, and that the magistrates were wrong.

WILLIAMS, J.—I am of the same opinion. In sample B, threads are in point of truth woven into a fabric, which brings the case within the 7 & 8 Vict. c. 15, s. 73. It is unnecessary to inquire what other words in the Factory Acts are applicable.

WILLES and KEATING, JJ., concurred.

Judgment for the appellant.

C. P. }
6 FEB. 1865. } FIELDING v. LEE and Another.

Bankrupt—Goods in his Possession with Consent of true Owner—Order to sell them—12 & 13 Vict. c. 106, s. 125.

T, at the time he became bankrupt, had, with the consent of the true owner, certain goods in his possession and was the reputed owner of them. An order made by a County Court Judge under 12 & 13 Vict. c. 106, s. 125, directed that the goods in or about the dwelling house in the occupation of T, in C street, known as “The Cross Keys,” should be sold by the assignee for the benefit of the creditors:—

Held, that the order sufficiently specified the goods to be sold, and that it need not state the names of the true owners of the goods.

Trover and trespass *de bonis asportatis* for household furniture.

Pleas.—1. Not guilty (by statutes 12 & 13 Vict. c. 106, s. 159; 13 & 14 Vict. c. 61, s. 19; 15 & 16 Vict. c. 54, s. 6).

2. That the goods were not the plaintiff's.

3. That before the grievance complained of, and after the Bankruptcy Act, 1861, one Taylor was declared bankrupt; and afterwards, and in pursuance of the said statute, a warrant of seizure, under the hand of E. O., Esq., Judge of the Court then and there having jurisdiction in the matter of the said bankruptcy, and under the seal of the said Court, was directed to the High Bailiff of the said Court, &c., and all other her Majesty's loving subjects, whom the said Judge thereby required to be aiding and assisting in the execution of the said warrant as occasion might require; and the said warrant required, authorised, and empowered the persons to whom it was directed to enter the house of the said bankrupt, and then and there to seize the goods of the said bankrupt, and in case of resistance, or of not having the key of any door or lock of any premises belonging to the said bankrupt where any of his goods were or were suspected to be, to break open, &c., or cause the same to be broken open for the better execution of the said warrant. And the defendants say that one Harper, being a bailiff of the said Court, and a person to whom the

said warrant was directed, and having the same in his possession, entered the house where the goods of the bankrupt then were, and were suspected by him to be, and took peaceable possession thereof, and was afterwards ejected from the same, and applied to the defendants pursuant to the said warrant to aid him in the premises; and thereupon the defendants, acting in that behalf at the request of the said Harper as aforesaid, entered the said house to assist the said bailiff in the execution of the warrant, and seized and took away the goods, &c., which are the alleged grievances.

4. That the alleged grievances were committed by the defendants after the passing of 9 & 10 Vict. c. 95, and 13 & 14 Vict. c. 61 (County Court Acts), and 24 & 25 Vict. c. 134 (the Bankrupt Act, 1861), and were committed by the defendants in pursuance of the said statutes, and no notice of action was given them one calendar month at least before the same was commenced.

Issue on the above pleas, and new assignment to pleas 3 and 4 that the defendants on other occasions, for other purposes, and with respect to other goods, &c., in excess of the alleged right or authority, committed such trespasses and grievances as in the declaration complained of.

Plea of not guilty to the new assignment, and issue thereon.

The facts of the case were as follow:—

Taylor, being the owner and keeper of a beer-house called "The Cross Keys," sold his fixtures and furniture to his son-in-law, Ogden, on the 13th of January, 1863, and went to live in a neighbouring cottage. On the 9th of September, 1863, Taylor's furniture and goods were sold under an execution in an action brought against him by the defendant Lee, the other defendant, Aspinall, acting as the auctioneer. At this sale the plaintiff bought the articles in respect of which the present action was brought, and left them in Taylor's cottage. On the following 10th of October, Kenyon, Taylor's brother-in-law, bought the goodwill and furniture of "The Cross Keys" of Ogden, and subsequently took out a licence, and put his name over the door, but he put Taylor in to carry on the business. Upon this the plaintiff's goods, which he had bought at the sale of the 9th of September, and which had been left in the possession of Taylor, were removed to "The Cross Keys." In February, 1864, Taylor was committed to gaol under the Small Debts Acts, and Kenyon went to reside at "The Cross Keys." On the 1st of April, 1864, Taylor was declared a bankrupt, and on the 29th of that month the defendant Lee was appointed creditors' assignee under the bankruptcy. On the 6th of June the Judge of the County Court in which the bankruptcy proceedings were being carried on made an order, under the 125th section of the Bankrupt Act, 1849, "That the household goods, furniture, &c., being in or about the messuage or dwelling-house and premises in the occu-

pation of the said T. Taylor in Cross Street, Middleton, and known as 'The Cross Keys,' be sold and disposed of by the assignees for the benefit of the creditors of the said T. Taylor."

On the 7th of June, the High Bailiff of the County Court, in pursuance of the above order, and of the warrant relied on in the third plea, entered "The Cross Keys," and took possession of the goods there, and was the same day ejected by Kenyon. On the next day the bailiff, with the assistance of the defendants, retook possession, and removed the goods, which were subsequently sold by the defendant Aspinall as auctioneer. Under these circumstances the present action was brought. At the trial before Serjeant Atkinson, at the last Manchester Assizes, the defendant contended that the sales by Taylor to Ogden, and by Ogden to Kenyon, were colourable and fraudulent; and further that, even if these sales were fair and honest, the goods in question were, with the consent of the true owner, in the possession, order, or disposition of Taylor, within the 125th section of the Bankrupt Act, 1849.

The learned Judge left to the jury whether, on the 7th of June, the goods were the property of the plaintiff; and they found that they were, and returned a verdict for him.

A rule was subsequently obtained to set this verdict aside and enter a nonsuit, pursuant to leave reserved, on the ground that no notice of action was proved to have been given; or to enter a verdict for the defendants on the third issue, with the like leave, on the ground that the third plea was proved; or for a new trial, on the ground of misdirection by the learned Judge in telling the jury that no notice of action was necessary; and secondly, that the defendants could not set up as an answer to the action that the goods were in the order and disposition of the bankrupt as reputed owner.

12 & 13 Vict. c. 106, (the Bankrupt Act, 1849,) s. 159, provides, that the defendant in any action brought for anything done in pursuance thereof "may plead the general issue, and give this Act and the special matter in evidence at the trial, and that the same was done by authority of this Act; and if it shall appear so to have been done . . . the jury shall find for the defendant."

13 & 14 Vict. c. 61, s. 19, provides, that no action shall be brought against any High Bailiff, or any person acting by his order, or in his aid, for anything done in obedience to a warrant under the hand of a clerk of the Court, and under the seal of the Court, until after demand of the copy and perusal of such warrant, and refusal for six days of such demand.

15 & 16 Vict. c. 54, s. 6, enables any person, against whom an action is brought for anything done in pursuance of the County Court Acts, to plead the general issue, and give the special matter in evidence.

12 & 13 Vict. c. 106, s. 109, empowers a "messenger of the Court, and his assistants, acting under

warrant of the Court, to break open any house, &c., of any bankrupt, where such bankrupt or any of his property shall be reputed to be, and seize upon the body or property of such bankrupt."

9 & 10 Vict. c. 95, s. 138, limits actions for things done in pursuance of that Act to three calendar months, and requires one month's notice of action.

24 & 25 Vict. c. 134, (Bankruptcy Act, 1861,) s. 3, vests in County Court Judges the powers and authorities of Commissioners of District Courts of Bankruptcy.

12 & 13 Vict. c. 106, s. 125, enacts, "That if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy."

E. James, Q.C., Baylis, and Pope, showed cause against the rule.

It was admitted by us at the trial, that no notice of action was given. The County Court Acts are not incorporated with the Bankruptcy Acts. The County Court Acts alone require notice of action; so that if the case was within the Bankruptcy Acts, we were not obliged to give any.

[*BYLES, J.*—The County Court Judge and High Bailiff are placed in the position of Commissioner and messenger.]

In finding for the plaintiff the jury found that the transfer of the goods was not colourable, but *bond fide*. The third plea justifies a seizure, but not a sale; it only justifies taking the goods of Taylor, and admits that these goods were ours.

The defendants could not seize without an order under 12 & 13 Vict. c. 106, s. 125. The order does not say that Fielding was the true owner of the goods, or that he claimed them; it is too wide, and should specify the goods to be sold,

Heslop v. Baker, 8 Exch. 411;

Quartermaine v. Bittleston, 13 C. B. 183.

The order in the case last cited was held bad, as it only said the goods which at the time C became bankrupt were by consent of the true owner in the possession of C, and whereof he was reputed owner. The question whether these goods were in the order and disposition of Taylor was rightly withdrawn from the jury.

Temple, Q.C., Wood, and Torr, in support of the rule.

The new assignment did not render unnecessary the question whether the goods were in the order and disposition of Taylor.

[*BYLES, J.*—*Mr. Pope* says the order should specify the goods of A. B.]

Even if that were so, the order is not conclusive,

Graham v. Fowler, 14 C. B. 134.

But the Commissioner need only be satisfied that there is a person who claims to be the true owner. If the statute is construed with reference to its object, that goods which have been the means of obtaining credit for the bankrupt should be liable to seizure, it cannot matter who the claimant is. The goods claimed by Fielding are only part of those specified in the order. It would be hard to require evidence before the order can be made both of specific goods and of the person who may thereafter come forward and claim them in an action. The goods were sufficiently earmarked by specifying the house in which they were, and it is not necessary to specify in the order the name of the person supposed to be the true owner,

Freshney v. Carrick, 1 H. & N. 653.

We say nothing on the third plea.

ERLE, C.J.—I am of opinion that the rule should be absolute for a new trial. The action is by Fielding, the owner of the goods, against the defendant for taking them, Lee being an assignee in bankruptcy, and they plead not guilty by statute. The evidence was that Lee seized them as assignee of Taylor, that Fielding was the true owner, and that the goods were in the order and disposition of Taylor the bankrupt, and that Lee was qualified by 12 & 13 Vict. c. 106, s. 159, to plead the general issue. If the matters I have spoken of were established in evidence, they constitute a defence, and show that the alleged wrong was really authorised by the Bankrupt Act; and there certainly was evidence to go to the jury on these points.

But the great argument has been on 12 & 13 Vict. c. 106, s. 125, by which there must have been an order made by the Bankruptcy Court. There was such an order, and the question turned on its validity. The course at the trial seems to have been to pass by the defendants' rights under the statute, and the Judge looked at the plea of justification, and then at the new assignment, and held this defence inadmissible. The order is before me, and the question is, is it a sufficient one. In *Heslop v. Baker* (*loc. cit.*), it was held that the order must be made; and in *Quartermaine v. Bittleston* (*loc. cit.*) there was a general order in the most general terms for sale of the goods, which at the time of the bankruptcy were in possession of the bankrupt, with the consent of the true owner; and this Court held that such a general order, unappropriated to any particular goods, was not a compliance with the statute. But the order here is more specific than it was in that case; in reality it specifies the goods and chattels in the occupation of the occupier of "The Cross Keys." The object of the statute was, that where creditors had dealt with persons who had got goods in their possession, with a mere colourable property in them, and for the purpose of thereby obtaining credit and carrying on their trade, there should, if bankruptcy supervened, be a remedy by which those goods might be taken for the benefit of the creditors. Here *constat*

de corpore to a certain extent what goods are to be taken. I should have come to this line of reasoning without the authority of *Freshney v. Carrick* (1 H. & N. 658); but I am fortified by the remarks of my Brother Martin there, which are very much what I have tried to express here.

BYLES, J.—I am of the same opinion. There is no doubt the goods were in the possession of the bankrupt, and there was evidence that it was with the true owner's consent. The only doubt I had was upon the order; and I would remark, that such an order as that in *Quartermaine v. Bittleston* must be wrong, for it amounts to this: "exercise the power the law gives you over any goods you may find." Here it was objected that it was not stated in the order who the claimant was, or what the goods were. As to the first objection, my Brother Martin's words are specifically applicable, for here we have two claimants, Kenyon and Fielding: he says (*Freshney v. Carrick*, 1 H. & N. 662), "the attention of the Commissioner ought to be called to the particular goods, but the order need not state that it is made against different parties, some of whom claim one part, some another part of the goods." Therefore, in such a case as this, the Commissioner is not bound to give the names of the owners. On the other point, it is sufficient to say they were the goods in the public-house, and perhaps this was the best description that could be given of them.

The new assignment does not apply to the pleas of not guilty and not possessed. As to the plea of not guilty, parties acting in aid of the High Bailiff had as much protection as he had, and might plead the general issue by statute. I will not say that the defence might not also have been admissible under the plea of not possessed. The only issue left is on the new assignment, which is immaterial for the present purpose, if the defence can be sustained on the other points.

Rule absolute for a new trial.

C. P. }
11 FEB. 1865. } BOURNE v. FOSBROOKE.

Trover—Gift by Married Woman—Possession of Donee good, except against Husband.

F's housekeeper was a married woman living apart from her husband, who, after her death, applied to F for her trinkets and effects, and was refused. She gave and transferred certain articles to the plaintiff, her niece, who was put to school by F, and spent her holidays with him. After her aunt's death the plaintiff left these things in F's house while she was away at school, and asked him to take care of them for her. F died while the plaintiff was absent at school, and his executor refused to give up these things to her:—

Held, that the plaintiff had sufficient possession to maintain trover and trespass against the executor, though she would have had no such right as against the husband of her aunt, or any one claiming through him.

Detinue and trover for furniture, trinkets, &c.

Pleas: To the 1st count, *non detinet*; to the 2nd, not guilty; and to both, that the goods were not the plaintiff's.

The plaintiff, an infant, sued by her father as next friend, and the defendant was the executor of the late Rev. P. Fosbrooke.

In the year 1853, the plaintiff, who was then five or six years old, came on a visit to her aunt, Susan Phillips, who was living as housekeeper with the testator, a bachelor. At the request of the testator, the plaintiff continued to reside with her aunt in his house; and he put her to school, clothed her, found her in pocket-money and travelling expenses, and in fact almost adopted her as his own child. In February, 1863, the aunt died, but the plaintiff still spent her holidays as before at the testator's house. On the 9th of January, 1864, she returned to school after the Christmas holidays, and a few days afterwards the testator died, leaving her a legacy and an annuity. The defendant, as executor, took possession of all the effects in the house of the deceased, and sent the plaintiff such of them as were labelled with her name. She, however, laid claim to several other articles, which were found in drawers and boxes in the house, on the ground that, though not labelled, they had been given to her, some of them by the testator, and others by her aunt; and that the testator had promised to keep them for her. The defendant refused to admit such claim, and sold them with the other effects of the testator; whereupon the plaintiff brought this action. The testator often remunerated Susan Phillips with gifts instead of wages, and some of the things so given were alleged to have been transferred by her to the plaintiff.

At the trial before Channell, B., at the last Leicestershire Assizes, it was proved that Susan Phillips was married in 1851, but that she had only lived with her husband a fortnight after the marriage, and had never taken his name, nor communicated with him since. It also appeared that after Susan Phillips' death her husband came to the testator's house, and asked for her watch and some other things; and that the testator told him there were heavy expenses before he could demand them, and that he could have no claim upon them as he was living in adultery. The jury found a verdict for the plaintiff for 25*l.*, the value of the goods claimed by her as gifts from her aunt, thinking that as to them there was a sufficient transfer of possession; as to the goods claimed through the testator, they found that there was a verbal gift, but no transfer of possession.

Under these circumstances, a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter it for her for 25*l.*, if the Court should be of opinion that she could maintain this action, notwithstanding that her aunt was a married woman. A rule was obtained accordingly.

Keane, Q.C., and *Merewether*, now showed cause.

The goods in question were the property of the husband at Law, whatever may be the case in Equity.

Lamphir v. Creed, 8 Ves. 599 ;

Carne v. Brice, 7 M. & W. 183 ;

R. v. French, 2 Moo. & R. 263 ;

Messenger v. Clarke, 5 Exch. 388.

In a Court of Equity the husband might be considered a trustee for his wife, but that will not avail here. See an *obiter dictum* of Williams, J., in

Bird v. Pegrum, 22 L. J. C. P. 166, 168.

An execution creditor of the husband could seize these goods under a *f. fa.* ; and it is his name that must appear in an indictment for stealing them. The wife cannot give them away without his consent : and in whatever form she receives wages, her earnings are her husband's.

Walter v. Hodge, 2 Swans. 92 ;

Bradshaw v. Beard, 31 L. J. C. P. 273 ;

Tugman v. Hopkins, 4 M. & Gr. 389.

Equity may give effect to an actual trust, or a trust to be implied from conduct or agreement : but there is no authority at Law for vesting a power of disposal in the wife. It cannot be said that she could dispose of these things as her paraphernalia ; for a married woman can have no *jus disponendi* with regard to things her right to which is merely founded on their being necessary to keep up her status.

It is open to us to set up the *jus tertii*.

O'Malley, Q.C., and *Markby*, in support of the rule.

The cases cited refer to the title of the husband, or some one claiming through him, as against the wife ; but these were goods taken out of the plaintiff's possession by a wrong-doer, and if the defendant justifies under a *jus tertii*, he must show that he claims under that third person,

Wilbraham v. Snow, 2 Wms. S. 47, *f.*

Even if a person has no right of possession, but is in lawful possession, and afterwards loses it, he can maintain trover against a wrong-doer.

Sutton v. Buck, 2 Taunt. 302 ;

Fyson v. Chambers, 9 M. & W. 460 ;

Herbert v. Sayer, 5 Q. B. 965.

The case of *Buckley v. Gross*, 32 L. J. Q. B. 129, is distinguishable, for there the plaintiff's possession was clearly against the consent of the true owner, and acquired by an act of spoliation.

Though the husband might rightfully claim from the wife, he could not rightfully claim from her donee, for her authority to give will be presumed.

Ringham v. Clements, 12 Q. B. 260.

ERLE, C.J.—I am of opinion that this rule should be made absolute. The plaintiff claims to have a right to recover from the defendant the value of certain articles of which the defendant has taken possession. They were in the house of the testator, and the defen-

dant has disposed of them as executor, and as he thought in performance of his duty. The claim comprised a great many articles appertaining to women's dress and ornaments, and the great contest has been, whether the property in them has passed to the plaintiff. As to many of them the jury say it has not ; but there is a class of articles, of the value of 25*l.*, as to which the jury find that they were given to the plaintiff by her aunt, and that the possession was transferred. It is a rule of law that property cannot pass by words of gift without transfer of possession, and therefore the contest has been, whether these things were given and transferred, and the jury found they were.

It is objected by the defendant that the aunt, who had the manual holding of these articles, was a married woman, and that her husband was alive ; and that therefore by law the articles were really the property of the husband, so that the gift had no operation, and the husband could come at any time and take them. The learned Judge was right in saying that such was the law of England. I do not say anything against an authority being presumed in the wife to give away these things, she having been left by her husband for fourteen years, and allowed to receive some of these things as gifts. But here, I think, the plaintiff did not derive any property as against the husband of her aunt. The question is, who is the party against whom her right is asserted ! If the husband had taken the things, the niece would have had no right against him ; but I think she can maintain this action against Fosbrooke, because a person having lawful and quiet possession of an article has a right to recover its value if a wrong-doer comes and takes it away. If such person were authorised by the owner, he would not be a wrong-doer ; but it is otherwise if he takes it without a colour of title. That is the result of the well-known case of *Armory v. Delamirie* (1 Smith's L. C.), and the other cases put by Mr. Markby, and is a familiar principle of law. Though the plaintiff was a school girl, visiting the testator, and receiving these presents from time to time, and leaving them at his house, yet in law I think she was in possession of them. Possession is a very ambiguous term. These articles were, some of them put in boxes in the house where the plaintiff was almost an adopted child, and others she handed over to the testator, and asked him to keep for her ; he acquiesced in that, and they remained in her possession by his hand, and by being placed by him in the drawers in which they were found after his death. They were quite as much in her possession as, in the case of *Fyson v. Chambers* (*loc. cit.*), the goods were in the possession of Fyson. The defendant, no doubt took them with the intention of doing his duty as executor, and if he had come in in any manner under the husband, there would have been no cause of action against him. But the husband did come forward and claim them, and the testator sent out a message to

him that he had no right to them, as he was living in adultery. The testator was no doubt wrong in his law, but it is clear he did not recognise the husband's title, and that consequently he kept on holding them on the same terms as before. That being so, I am obliged to come to the conclusion, that the plaintiff is entitled to maintain this action.

KEATING, J.—I am of the same opinion. If the defendant had been in a position to obtain title from the husband, he would have had a good answer to this action; and that is the only question on which the Judge at the trial expressed his opinion. The defendant's testator rejected the title of the husband, and the jury found, though with reference to another question, that, in fact, possession had been transferred by the wife to her niece. Therefore the possession was in the plaintiff, and there is nothing in the case to show that the defendant obtained a position which can avail against that.

SMITH, J.—I am of the same opinion. It is clear the defendant had no right to these goods; and his testator disclaimed the husband's title when he claimed them. The question, and the only one which arises, is, had the plaintiff such possession as to entitle her to maintain this action? and I think it is impossible to say she had not possession as against all the world, except the husband. There was a gift to the niece, and it is clear she must have been in possession on the finding of the jury, who said that the gift was good, supposing the aunt was sole. That possession was never divested out of her, for she either kept the things herself, or left them in the house on the understanding that they were hers. She has, therefore, a good title as against everybody but the real owner. *Buckley v. Gross* (loc. cit.), was only a case of possession by those who had intercepted the tallow, and does not interfere with the general rule. Crompton, J., there says, "no doubt bare possession is sufficient to maintain trover or trespass as against a wrong-doer who takes the article from the person having possession. It does not, however, appear to me that the plaintiff was 'the finder' within the case of *Armory v. Delamirie*; he rather became possessed of the tallow feloniously or fraudulently, and he was not a mere innocent finder." Here the plaintiff was a perfectly innocent holder.

Rule absolute.

Ex. Ch. } CAMERON v. THE CHABING
6 FEB. 1865. } CROSS RAILWAY COM-
FANY.

Coram—POLLOCK, C.B., CROMPTON, and MELLOR, JJ.,
BRAMWELL, CHANNELL, and PIGOTT, BB.

8 & 9 Vict. c. 18, s. 68—"Lands or any interest therein"—Compensation—Good-will—Trade Profits.

Held, on the authority of *Ricketts v. Metropolitan*

Railway Company,* that a loss of trade profits in the plaintiff's business, as a baker, caused by the temporary obstruction of a thoroughfare by the defendant's railway, is not a subject of compensation under 8 & 9 Vict. c. 18, s. 68:—

This was an appeal against a judgment of the Court of Common Pleas, discharging a rule to set aside a verdict for the plaintiff, and enter a nonsuit, reported 4 N. R. 150, s. c. 33 L. J. C. P. 333.

Shield (*Lush, Q.C.*, and *W. H. Mellor* with him) was stopped by the Court.

[POLLOCK, C.B.—We are all of opinion that the judgment given two days ago by this Court, in

Ricketts v. The Metropolitan Railway Company, governs the present case.]

H. Giffard (*MacLachlan* with him). In

Ricketts v. The Metropolitan Railway Company, there was not a total obstruction of traffic, there was a hoarding erected which was only an impediment. In this case, for a short time, there was a total obstruction.

[CHANNELL, B.—The judgment of this Court in *Ricketts v. The Metropolitan Railway Company*, overrules the decision of the Common Pleas in this case, in express terms.]

The Court reversed the judgment.

Judgment reversed.

Ex. Ch. } DOGGETT v. CATTON.
6 FEB. 1865.

Coram—POLLOCK, C.B., CROMPTON and MELLOR, JJ.,
BRAMWELL, CHANNELL and PIGOTT, BB.

16 & 17 Vict. c. 119—Gaming—"Place"—Owner and Occupier.

The shade of a tree in a public park is not a "place" within the meaning of the Act for the suppression of betting-houses, 16 & 17 Vict. c. 119.

Appeal against a decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the plaintiff, reported 5 N. R. 132; s. c. 34 L. J. C. P. 46.

Hayes, Serjt.

The action in this case was brought to recover money received by the defendant as a deposit on a bet, and [was founded on the 5th section of 16 & 17 Vict. c. 119, the Act for the suppression of betting-houses. The 4th section of that Act provides, that "any person, being the owner or occupier of any house, office, room, or place" used for the purposes of betting, or any person acting for the owner, or any one having the care and management of the business, receiving any money as a deposit on a bet, is liable to a penalty of 50l. And then the 5th section authorises the recovery of any money received by "any such person

* To be reported next week.

aforsaid" as a deposit on a bet. The words "such persons," evidently refer to the preceding section. The question in this case is, whether the shadow of a tree is a "place" within the meaning of the statute. The substantial ground on which the judgment of the Court below proceeded was, that the defendant had "frequented" this place. But that is not sufficient. The 4th section shows that the place must be one not only capable of occupation, but owned or occupied. The words in the 4th section are, "house, office, room, or other place;" it is clear, therefore, that the meaning of the word "place" is restricted by that of the words which precede it.

[CROMPTON, J.—The only question is the meaning of the words "owner or occupier." Was the defendant in occupation?]

[BLACKBURN, J.—The 5th section carries out the provisions of the 4th. If the defendant was liable to the penalty under the 4th section, then he is liable here.]

Yeatman.

It is not necessary to hold that the person against whom this action is brought must fall within the description in the 4th section. He may be a person "using" a betting-house within the first three sections. The Act was especially framed so as to include not only the owner of the house, but those who frequented the house for the purposes of betting. This is clearly a place within the meaning of the Act.

[POLLOCK, C.B.—All the Court agree that, under other circumstances, this might have been a place within the meaning of the Act; but the Act requires a place with an owner or occupier.]

POLLOCK, C.B.—We are all of opinion that the judgment of the Court below should be reversed. Nothing is noticed in that judgment except the fact that the *locus in quo* might be a place within the meaning of the statute. I should so far agree with that judgment, that the fact of its being an open place without a house, office, or room, would not prevent its being a place, if it appeared that there was an owner or occupier, or the possibility of there being one. That does not appear in the present case.

CROMPTON, J.—I am of the same opinion. I quite agree with the Lord Chief Baron in what he said about the word "place." The present case does not come within the statute; for looking at the preamble we find that this Act was passed in consequence of a kind of gaming having sprung up by the opening of betting-houses, and the receiving of money in advance by the owners or occupiers of such houses. The 4th section

refers to part of the mischief mentioned in the preamble of the Act, that is to the receiving of money in advance by the owner or occupier of the betting-house. Then follows the 5th section, which carries out the 4th, and gives the person who has paid money as a deposit on a bet a remedy he would not otherwise have possessed. For the plaintiff and defendant being *in pari delicto*, no action would lie, unless specially allowed. The words "such person" then in the 5th section, refer back to the 4th section, and mean owner or occupier, &c. But in this case it cannot be said that the defendant was owner or occupier of the place in question.

BRAMWELL, B.—I think the judgment of the Court below must be reversed; but I am very reluctant to state, as a reason for reversing it, that the 4th and 5th sections apply only to the owner or occupier, or person acting on his behalf. The words in the 2nd section are, "Every house, &c., opened, kept, or used;" and the words in the 4th section, "Any person having the care or management," &c., seem to refer to the word "used" in the 2nd section. I think, therefore, that any person would be liable, whether owner or not, who used the house, &c., and had the care or management of the business. But in this case, the defendant cannot in any sense be said to have opened, kept, or used this place. There is, in fact, no place capable of being used. I put my judgment on the ground that this is not a place within the statute.

CHANNELL, B.—I am of opinion that the judgment must be reversed, and I agree with the reasons given by the Lord Chief Baron. I think that the provisions of this Act extend, not only to an owner or occupier, but also to a person receiving money and acting for the owner.

BLACKBURN, J.—I think that the judgment must be reversed. The 5th section of the Act refers back to the 4th, and applies to the same persons who are liable to a penalty under the 4th section—that is, to the owner or occupier, &c. It must, therefore, be shown that the defendant belongs to one of these classes; but that does not appear. The plaintiff, indeed, seems to have been quite as much in occupation as the defendant.

MELLOR, J.—I am of the same opinion, and I agree with my Brother Bramwell that this is not a place within the statute.

PIGOTT, B.—I think the judgment must be reversed for the reasons given by my Brother Bramwell.

Judgment reversed.

EQUITY.

House of Lords. } PARKER v. TOOTAL.
14, 16, 17 FEB. 1865. }

Present—THE LORD CHANCELLOR, LORD CRANWORTH,
and LORD CHELMSFORD.

*Will, Construction—Estates Tail by Implication
—Gifts to a Class.*

A testator gave an estate to T for life, with remainder to his "first son severally and successively in tail male," and for want of such lawful issue, either by T or by J, then to his "daughters and their children in fee":—

Held, 1st, that T was tenant for life, and estates tail were given to the first and other sons of T:

Semble, 2ndly, that estates tail were given by implication to T and J, after the estates tail of the first and other sons of T:

Held, 3rdly, that the child of a daughter who died before the date of the will could not take.

This was an appeal from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Exchequer in an action of ejectment brought against the defendant in Error.

The question involved related to the construction of the will of Thomas Chorlton, who died in 1799, and whose will, so far as material, was as follows:

"I give and devise unto my grandson, Thomas Chorlton, son of the late Richard Chorlton, all that my estate where I now live, and known by the name of Waste Estate, now in the tenure or holding of Thomas Walker, his assigns, or under-tenants, for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton lawfully begotten severally and successively in tail male of the name of Chorlton, and for want of such lawful issue of that name either by my said grandson Thomas Chorlton or my son James Chorlton, then I give and devise the said estate where I now live and the Waste Estate amongst my daughters and their children, share and share alike, to hold unto them, his, her, or their, heirs for ever, as tenants in common, but not as joint tenants."

The testator left surviving his grandson Thomas his heir-at-law, and also his son James who died in 1804 (leaving one son who died, without issue, in 1823), and several daughters.

In 1810 Thomas, the grandson, suffered a recovery, and then sold and conveyed the estate to one Craven, under whom the respondent claimed.

Thomas, the grandson, died in October, 1838, without, as was admitted at the bar, having had any

son, who had attained majority, or was alive at the date of the recovery.

In July, 1858, the present action was brought by the real representative of a son of Ann Barrow, one of the testator's daughters. Ann Barrow had died before the date of the will, but her son, under whom the appellant claimed, survived the testator. A special case was stated, and came on for argument before the Court of Exchequer, when the Court, without argument and without expressing any opinion, gave a *pro forma* judgment for the defendant, whereupon Error was brought in the Exchequer Chamber.

The Court of Exchequer Chamber affirmed the judgment of the Court below, intimating that they did so in deference to previous decisions on the same will.

The previous proceedings, with regard to the will, were as follows—

Upon the contract for purchase from Thomas, the grandson, Craven, the purchaser, objected to the title, on the ground that Thomas was not seised in fee. Thereupon Thomas filed a bill for specific performance. A reference as to title was made to the Master, who reported in favour of the title. Exceptions to the report were taken by the defendant, and on the hearing of such exceptions a case was sent from Chancery to the Court of King's Bench for its opinion, when the Court of King's Bench certified that Thomas took under the will an estate in tail male, and that he had by the recovery acquired the fee simple. This certificate was confirmed by Lord Eldon, the then Lord Chancellor, and specific performance was decreed against Craven.

Shortly after the completion of the purchase, Craven mortgaged the property to one Rushton, who filed a bill for foreclosure in the Court of Exchequer in Equity. By the decree made in that cause, the property was ordered to be sold. William Croft, the purchaser of certain of the lots, including the premises the subject of the present appeal, objected to the title. A reference as to the title was made to the Master, who certified that a good title could be made. Croft then filed exceptions to this report, and the exceptions were argued before the Court, when judgment was reserved. Subsequently Chief Baron Richards delivered the judgment of the Court, overruling the exceptions, and confirming the report.

Reports of these proceedings will be found in the cases,

Rushton v. Craven, 12 Pr. 599;

Mellish v. Mellish, 2 B. & C. 534; 3 Dow. & Ry. 808.

Manisty, Q.C., and *Hardy*, for the appellant, contended that Thomas, the grandson, took only for life, with remainder either to his first son or to his first and other sons in tail male, with remainder by implication, either to James' first son, or to his first and other sons in tail male (according as Thomas' first son only, or his first and other sons should be held entitled to estates tail), with remainder to the daughters and their children in fee, which last would be a vested remainder, and consequently unaffected by the recovery.

They insisted that the expression "such lawful issue," so far as it referred to Thomas' issue, was strictly referential, and used merely to express the termination of the estates previously given, whatever those estates might be,

Baker v. Tucker, 3 H. of L. Ca. 106 ;

Blackburn v. Edgley, 1 P. Wms. 600 ;

Lewis v. Waters, 6 East, 336 ;

but that with regard to James' issue, "such" could not be referential, inasmuch as no estates had been previously given to any of them, and that consequently it becomes necessary to imply similar estates in the son or sons of James, as those to which the son or sons of Thomas should be held entitled to,

Wilkinson v. Adam, 1 Ves. & B. 466 ;

Evans v. Asley, 3 Burr. 1570 ;

[LORD CRANWORTH observed that that case had been overruled.]

Tenny v. Agar, 12 East, 252 ;

Daintry v. Daintry, 6 T. R. 307.

They dwelt upon the anxiety evinced by the testator to keep the estate in the male line, as making it most improbable that he should have left a chasm between the estates given to Thomas' sons and those given to the daughters and their children.

Sir Hugh Cairns, Q.C., and *Lewin*, for the respondent.

1st. If there is any room for implication here, Thomas must have an estate tail, either immediately or in remainder after the estates limited to his sons. Even apart from implication, "sons," is often a word of limitation,

Robinson v. Robinson, 2 Ves. 225 ;

Mellish v. Mellish, 2 B. & C. 520 ;

Doe v. Garrod, 2 B. & Ad. 87 ;

Doe v. Davies, 4 B. & Ad. 43 ;

Raggett v. Bealy, 5 Bing. 243 ;

Lewis v. Puzzle, 16 M. & W. 733.

The word "such" is sometimes referential, sometimes not—there is no fixed rule. Here "such" lawful issue means simply "male" lawful issue. The manifest intention of the testator is, that the estate shall not go to his daughters till all his male descendants are exhausted ; and for that purpose estates tail *must* be given to Thomas and James. Estates tail cannot be given to James' sons by virtue of such words as these—that would be unheard of ; to let

them in, an estate tail must be given to James ; and if to James, then to Thomas also. Estates tail in the first and other sons of Thomas would not provide for all his possible male issue ; such limitations would, under the old law, leave the issue of his eldest son unprovided for, if such son had died before the testator,

Doe v. Gallin, 5 B. & Ad. 621 ;

2 Jarm. Wills, 456 ;

Doe v. Halley, 8 T. R. 5 ;

2nd. If no estates at all are to be raised by implication, then the limitation to the daughters was clearly a contingent remainder, and destroyed by the recovery. There is no necessity here for implying previous estates tail in order to support the gift to the daughter,

Jack v. Feltherston, 2 Hud. & B. 320 ;

Cole v. Sewell, 4 Dr. & W. 1 ; 2 H. of L. Ca. 186 ;

Fearne Cont. Rem. 522, note 9.

3rd. At all events the appellant is entitled to nothing. He cannot possibly claim under a gift to "my daughters and their children," when his mother was not alive even at the date of the will. There is no case exactly in point, but

Clay v. Pennington, 7 Sim. 370,

and the other cases cited in

2 Jarman, 726,

may illustrate the question.

They also cited,

Gardiner v. Sheldon, 1 Freem. 11 ;

Lanesborough v. Fox, Cas. t. Talb. 262 ;

Ranelagh v. Ranelagh, 12 Beav. 200 ;

Neighbour v. Thurlow, 28 Beav. 33 ;

Barnet v. Barnet, 29 Beav. 239.

Manisty, Q.C., in reply.

THE LORD CHANCELLOR, in moving that the appeal be dismissed, said, that their Lordships were asked, on the construction of a difficult will, to subvert a conclusion which had been arrived at by the Court of King's Bench, confirmed by Lord Eldon in 1812, and adhered to, after a long argument, by the Lord Chief Baron in 1823. The interval of time since 1812 must have given rise to a well-founded confidence on the part of the owners of the estate that they had a right to rely upon those decisions. Yet, in strictness the law allowed of the question being opened.

It appeared to him that there was a clear gift for life to Thomas. Then followed the difficulty. The sentence which gave an estate to the "first son of Thomas severally and successively" was seemingly deficient. It was reasonably clear from the formula used, that the deficiency must be made up by adding the words "and other sons," otherwise the words "severally and successively" would in reality be struck out. With regard to the words "for want of such lawful issue," the difficulty was, whether they were meant to imply nothing more than the termina-

tion of the estates previously given. The appellant contended that the simple referential meaning of the word "such" was well established. On the other hand, the respondent argued with great force, that those words indicated a special intention of the testator to provide for all male issue of his loins bearing his name. The contingency had been put off the first son of Thomas dying before the testator, and leaving male issue, who would not be provided for. It was therefore argued that the referential force of the word "such" was entirely satisfied by holding it to relate to the antecedent "male," and that "such lawful issue" simply meant "male lawful issue." If that were the reasonable interpretation of the terms, it would annex to the estates tail expressly given to the sons, a direction that the estate should not go over till after a general failure of male issue, in which case the House would, according to a well-known rule, imply an estate in tail male in Thomas, after the estates tail of his sons: he thought that must be the interpretation of the certificate. His Lordship, after referring to certain traditions of the Bar, as showing that Lord Eldon was not in the habit of accepting certificates of the Judges without criticism, and that he would not have forced the title upon a purchaser if he had thought it doubtful, continued, that the construction which gave an estate tail to Thomas, though not carrying the doctrine of the referential force of "such" to the length to which it had been carried in some cases, yet would not only give effect to every word in the will, but would also make them give an estate tail to James, whereby the whole series of gifts would become complete. If that construction was not right, the only other construction was, that no estates were to be implied at all. The words "for want of such issue," &c., might mean, if expanded, "in default of such issue male by my son Thomas, as would be entitled to take under the antecedent limitations of my will, and also in default of such issue of my son James as would be entitled under similar limitations to the sons of James." Would such words give estates to the sons of James, or would they merely refer to an event on which the estates of the daughters were contingent? His Lordship agreed with a remark made at the Bar, that on the doctrine of implication the older cases were not safe authorities. Implication might be founded either, first, on an elliptical form of expression, which involved something else; or, secondly, on the form of the gift, or a direction to do something which could not be done without implying or involving something else. If one gave an estate to his heir-at-law after the death of A B, as the form of gift showed the heir was not to take till after the death of A B, and as the estate in the interim must either escheat or go to A B, the law gave it to A B. Again, if one estate were given to A in tail, and another to B in tail, and "if both die without issue" to X, there cross remainders were implied.

Here his Lordship was unable to find in the expression as amplified by him, anything like a plain indication of intent, that the first and other sons of James were to have estates tail, nor did he find such implication necessary to support the gift over to the daughters. It was a wholesome rule that the language of a testator must be construed in conformity with his intention, but that must not be an intent to be gathered from extrinsic grounds, but an intent the grounds for imputing which must be derived from the will. If the language referring to the sons of James could be satisfied by reference to a contingency, then there would be no grounds for giving those words a more extended signification, and his Lordship could find no warrant in what was written for raising such estates. Whether Thomas then was entitled in tail or for life only, the claim of the appellant would equally fail. His Lordship then stated, that he had not avoided those questions, although it had not been necessary for him to enter on them, as there was a further ground on which the appeal must be dismissed. The appellant had failed to bring himself within the compass of the residuary gift to "my daughters and their children." The gift to the daughters was clearly a gift to a class, and as that class must be determined by the state of things at the date, either of the will, or of the death, it was clear that Ann Barrow was not one of that class. Then came the words "their children," the whole clause was read by the appellant as equivalent to "my daughters and the children of my daughters." But there, the word "daughters" as used in the second place, had a different meaning from that which it had in the first place. It was clear to his Lordship, that the word "their" connected the children with the persons who constituted the class first mentioned, and with none other.

LORD CRANWORTH was clearly of opinion, that the last point was conclusive. His Lordship could not help suspecting that the testator meant to include the children of deceased daughters, but to hold them entitled would be to make a will for him. "My daughters" could only mean those living at the date of the will, and "their" only referred to them. His Lordship, however, thought it his duty to express an opinion on the other point, as there might be descendants of another daughter who might set up a claim. It was impossible to say there was no doubt. It was clear that Thomas, in the first instance, had only a life estate. Then with regard to the words "first son, severally and successively," he felt bound to infer that the words must be read, "first and other sons;" after that, except by implication, there was no gift to any one but the daughters. His Lordship thought it would be a very violent implication to imply the same estates in the sons of James as in the sons of Thomas. If any estates were implied, it must be estates tail in Thomas and James. This would not

infringe the alleged rule, that "such" was never used to enlarge a previous estate, as a new estate would be given. His Lordship was of impression that estates tail ought to be implied in Thomas and James, though whether there were or not would make no difference to the appellant.

LORD CHELMSFORD concurred on all points, being of opinion that the appellant did not come within the description, and further, that the anxious desire of the testator that the estate should continue in the name of Chorlton, made it necessary to imply an estate tail in James, and by parity of reasoning, in Thomas also.

Minute.—Appel dismissed.

Privy Council. } *GOUGH v. JONES.*
2 FEB. 1865.

Present—LORDS CRANWORTH and CHELMSFORD, and the LORDS JUSTICES K. BRUCE and TURNER.

Consolidated Chapelry—Church-rate—19 & 20 Vict. c. 104—Relinquishment of Fees—Practice.

Consolidated chapelries and district chapelries, though differing in origin, are, when once formed, precisely similar in character.

Consolidated chapelries are within the 19 & 20 Vict. c. 104, s. 14.

What is a "relinquishment of fees" within the 19 & 20 Vict. c. 104, s. 12.

A defendant is not bound to appeal from an interlocutory decree, though he might so have raised the whole question at issue.

This suit arose out of a church-rate, made in the year 1861, for the repair of the church of St. Mary, at Shrewsbury. The parish had been shortly before divided into several new ecclesiastical districts, and the rate was disputed on the two following grounds—

1st. That a certain district called Leaton, which should have been assessed to the rate, had been left out.

2nd. That the repairs for which the rate was made were extravagant.

The consolidated chapelry of Leaton was constituted by Order in Council of 1860, out of portions of the parishes of St. Mary, Shrewsbury, Fiz, and Preston Gubbalds; all fees which, but for the new arrangement, would have been payable to the incumbents of these three parishes respectively, being reserved to them during their incumbencies. All three incumbents, however, tacitly allowed the incumbent of Leaton to keep the fees for himself—two of them being apparently unaware that their rights had been reserved. It was therefore doubtful whether, by this tacit relinquishment of the fees to the incumbent of Leaton, he had become "entitled" to them within the meaning of 19 & 20 Vict. c. 104, s. 14, and whether, consequently, by the operation of that statute, Leaton had

become a separate district within the meaning of 6 & 7 Vict. c. 37, s. 15, and so not liable to be assessed to church-rate for St. Mary, Shrewsbury.

The Dean of Arches, on the 18th of December, 1864, delivered judgment in favour of the rate (see *Gough v. Jones*, 10 Jur. 185), and held—first, that Leaton had become a separate district, and was, therefore, rightly omitted from the assessment; secondly, that the objects of the rate were not extravagant.

From this decision the defendant now appealed.

A preliminary objection was taken by the respondent, that the appellant might have raised the whole question by appealing from an interlocutory decree of the Court below upon the admission of the articles (see *Gough v. Jones*, 1 N. R. 107); but the Court held that there was no obligation upon the appellant to have adopted the course suggested.

Dr. Deane, Q.C. (Lush, Q.C., with him), and A. Wills, for the appellant, did not press the objection to the object of the rate, but upon the point of law argued:

1st. The statute 19 & 20 Vict. c. 104, has no application to consolidated chapelries.

This is an amending Act, and the amended Acts, 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, do not apply to "consolidated," but to "district" chapelries.

The distinction between the two classes of chapelries may be founded upon no principle; but a principle is not to be looked for in the Church Building Acts. If the two classes are identical, the many statutory provisions for converting one into the other would be useless. The distinction is always maintained by the Legislature; e. g., in 8 & 9 Vict. c. 70, s. 9, and in 15 & 16 Vict. c. 97, ss. 2, 3, 4; also in the various provisions as to the reservation of fees to the original parish, and as to the qualifications of churchwardens.

2nd. Assuming that the statute applies to consolidated chapelries, its requirements have not in this case been complied with.

A mere relinquishment of fees does not make the incumbent of the chapelry "entitled" "by such authority" as is intended by the statute.

The authority must be an irrevocable one, on the analogy of

The Queen v. Perry, 30 L. J. Q. B. 141.

Nor does the mere fact that the fees have, in this case, partly from ignorance of the law, not been demanded by the incumbents of the old parishes, amount to a "relinquishment" under section 12, still less to a "voluntary relinquishment" under 8 & 9 Vict. c. 70, s. 10.

Powell, Q.C., and Dr. Robertson, contended, on behalf of the respondents,

The Act applies, and there has been an implicit, though not a formal, relinquishment of the fees to the incumbent of Leaton.

Dr. Deane, in reply.

LORD CRANWORTH, delivered the opinion of the Committee and said—It had already been decided (*Gough v. Jones*, 1 N. R. 307), that a district which could make rates for itself, under 19 & 20 Vict. c. 104, was no longer liable for the rates of the original parish for twenty years, under 58 Geo. 3, c. 45. The question, therefore, before their Lordships was, whether Leaton had ceased to form part of the parish of St. Mary, Shrewsbury. From 58 Geo. 3, c. 45, downwards, there had been a multitude of statutes for the creation of new ecclesiastical districts. Powers had first been given for carving a district out of a parish; then had come a number of enactments regulating the relations of the new district to the old parish; then it had been found necessary to provide also for taking portions of several parishes to form a new district, which had been called a "consolidated chapelry." But all chapelries, whether taken out of a single parish, or out of several, were of one and the same nature. By 19 & 20 Vict. c. 104, s. 14, whenever the exercise of certain functions was authorised in a district church, and its incumbent became solely entitled to the fees "by such authority," then the district was to become "a separate and distinct parish for ecclesiastical purposes" within 6 & 7 Vict. c. 37, s. 15; which had been decided to mean that its inhabitants might make rates for their own district, and were no longer liable for those of the old parish.

By an Order in Council of 1860, Leaton had been taken out of St. Mary, Shrewsbury.

They had two questions to decide—First: Had the incumbent of this district become entitled to the fees? He was not so entitled merely by the fact of the district being constituted, but only if the incumbents of the three parishes had relinquished the rights reserved to them. Whether they had or not was a question of fact, which the Court below had decided in the affirmative; and the rule of this Court was, that where a matter of fact had been fully and fairly considered in the Court below, the decision of that Court ought not to be disturbed on appeal. Secondly: Had he become entitled by "such authority" as was intended by the statute? Their Lordships considered that he had. By "such authority" was meant, the authority under which the district was constituted.

They would report to Her Majesty that in their opinion the appeal ought to be dismissed with costs.

Privy Council. } THE BETA.
9 FEB. 1865.

Present—LORD CHELMSFORD, and LORDS JUSTICES
K. BRUCE and TURNER.

Licensed Pilot—17 & 18 Vict. c. 104, s. 374—
Construction.

The 374th section of the Merchant Shipping Act, 1854, enacts that no licence granted by the Trinity House shall continue in force beyond the 31st of January ensuing the date of the licence, but "the same may,

upon the application of the pilot holding such licence, be renewed on such 31st day of January in every year, or any subsequent day":—

Held, that this referred to the date when the renewal took effect, not when it was made, and, therefore, that a renewal dated the 20th of January, was good in May following.

In the month of May, 1864, the screw steamship "Beta" ran into and sank the barque "Fides." The pilot on board the "Beta" held a licence renewed by the Trinity House on the 20th of January, 1864. By section 374 of the Merchant Shipping Act, 1854, "subject to any alteration to be made by the Trinity House, no licence granted by them shall continue in force beyond the thirty-first day of January next ensuing the date of such licence, but the same may, upon application of the pilot holding such licence, be renewed on such thirty-first day of January in every year, or any subsequent day, by indorsement under the hand of the secretary of the Trinity House, or such other person as may be appointed by them for that purpose."

The owners of the "Fides" endeavoured to render the "Beta" liable for the collision, on the ground that the pilot of the "Beta" was not "duly licensed or qualified." Other points had been argued in the Court below, but the only question now was, as to the construction of the Act. On this point, Dr. Lushington decided that the pilot was duly licensed, which decision was now appealed from.

The Queen's Advocate, and *Dr. Twiss*, for the appellants, contended that the Act must be construed with all technical strictness,

The Earl of Auckland, 1 Lush. 180.

They also cited,

6 Geo. 4, c. 125, s. 10;

Hammond v. Blake, 10 Barn. & Cress. 424;

16 & 17 Vict. c. 129, s. 23.

Dr. Deane, and *E. C. Clarkson*, for the respondents.

The Queen's Advocate in reply.

TURNER, L.J., delivered the opinion of the Committee, and said—Although it would be going too far to say, that there was no difficulty in the construction of that section of the statute upon which the case arose, yet their Lordships had come to a very clear conclusion upon the subject. The section seemed capable of two constructions, either that the act of renewal was to be done, or that the renewal was to take effect on the 31st day of January. Their Lordships thought that the Legislature meant that the renewal was to take effect on the thirty-first. That construction fell in with the convenience of the case, for if their Lordships accepted the appellant's construction great inconvenience would arise, and certain districts, to which the Act applied, might be days, possibly weeks, without any qualified pilot. Their Lordships, therefore, agreed with the opinion of the learned Judge below.

They would report to Her Majesty that in their opinion the appeal ought to be dismissed with costs.

Privy Council. } GREATA v. TREASURE.
2, 11 FEB. 1865.

Present—The LORDS CRANWORTH and CHELMSFORD,
and the LORDS JUSTICES K. BRUCE and TURNER.

Churchwardens—Proxy—Letters of Request.

G, one of the churchwardens of a parish, instituted a suit for church-rate in the names of himself and F, the other churchwarden. A proxy was first filed for G only, and it was declared that F proceeded no further with the suit. A subsequent proxy was filed, purporting to be for both churchwardens, but signed by G only. The defendant appeared all along under protest, on account of the non-joinder of F, who in fact had nothing to do with the suit:—

Held, that one churchwarden cannot sue alone. He has no implied authority to give a proxy for the other, or to join him in a suit. Nor can the Court compel or dispense with the joinder of the unwilling churchwarden.

Letters of request are no part of the record.

This was an appeal from the decision of the Court of Arches in a suit for subtraction of church-rate.

The letters of request, by which the suit was removed from the diocese of Bath and Wells, recited that it was about to be promoted by Greata and Fry, the two churchwardens of the parish of Cheddar. On the 18th of April, 1864, a proxy for Greata only was exhibited by his proctor, who also declared that Fry proceeded no further in the suit.

On the 10th of June, Greata's proctor exhibited another proxy, which purported to be the proxy of both Greata and Fry, but was signed by Greata only. The defendant appeared all along under protest, on account of the non-joinder of Fry, and the Court, on the 3rd of August, decided in his favour, holding—

1st. That one churchwarden, there being two, cannot maintain a suit in his own name only :

2nd. That the Court has no power to compel the recusant churchwarden to join in the suit.

The Queen's Advocate, and T. S. Pritchard, for the appellants, now argued—

1st. One churchwarden may sue alone.

The point has not been expressly decided either way ; but the general practice of the Courts, when necessary parties to a suit will not join, is to allow the suit to proceed, upon the unwilling party being indemnified against any costs to which he may become liable,

Kirkhouse v. Fawcener, 2 Lee, 331 ;

Cook v. Couper, 2 Lee, 388 ;

Emery and Another v. Mucklow, 10 Bing. 23 ;

Ex parte Turquand, 3 M. D. & D. 475 ;

Whitehead v. Hughes, 2 Cr. & M. 318 ;

Auster v. Holland, 15 L. J. Q. B. 229 ;

Morgan v. Thomas, 2 Dowl. 332.

As to the status of churchwardens, see,
1 Roll. Abr. 393, "Churchwardens ;"

4 Vin. Abr. 525, "Churchwardens," A.

Churchwardens are only a *quasi*-corporation,
Grant on Corporations, 4 :

They are merely trustees, with exceptional powers when the ordinary powers of trustees are inadequate,
13 Hen. 7, fol. 9.

In

Starkey v. Berton, Cro. Jac. 234, and Yelv. 172, churchwardens are exceptionally treated as a corporation, for the benefit of the parish ; but with this case

Goldsworth v. Knights, 11 M. & W. 337, may be contrasted, in which they were held not to be a corporation to the disadvantage of the parish.

Starkey v. Berton (*loc. cit.*),

Quiller v. Newton, Carth. 151, are the only cases in which one churchwarden has sued alone. In

Liddell v. Westerton, Moo. 12, 82, the churchwardens were on opposite sides.

2nd. Greata had at any rate an implied authority to use Fry's name, and the Court could have compelled Fry to allow it to be used. If the contrary view be adopted, the monstrous consequence would follow that, though a rate might have been made by a large majority, one of the churchwardens, who might himself be the defaulter, might prevent any steps being taken for its recovery. Even if such a state of things could be remedied, which is not the case, by a *mandamus* or a *monition*, it would be most unfair to put the parish to this expense.

3rd. It is not open to the defendant to take this objection.

4th. The proxy was sufficient :

Law's Oughton's Ordo, tit. 12, p. 31 ;

Coote's Practice, 264 ;

Canon, 129, 3 Burn's Eccl. Law, 377 ;

The Orders of Court, 5 and 7, of 1630 ;

The rule has always been liberally construed. The proxy may be produced at any stage of the case, and need not be produced unless called for,

Prankard v. Deacle, 1 Hag. 185 ;

Collett v. Collett, 1 Curt. 678 ;

Kirkhouse v. Fawcener (*loc. cit.*).

It is not necessary that every party whose name is on the record should give a proxy under his hand,

Grant v. Atkinson, 1 Lee, 168 ;

Cook v. Couper (*loc. cit.*) ;

Lopes da Rosa v. Lusitano de Pinna, 2 Lee, 390 (n).

A party once on the record cannot be dismissed except by a decision of the Court,

Panchard v. Weger, 1 Phil. 212 ;

Sanders v. Wigston, 1 Rob. E. 460.

Dr. Deane, Q.C., and J. Brown, for the respondents, contended—

1st. Both churchwardens must join in a suit. Analogy favours this view,

Rice v. Shute, 1 Sm. L. C. 502 a ;
Cabell v. Vaughan, 1 Wms. Saund. 291 ;
Northwaite v. Bennett, 2 Cr. & M. 316 ;
Starkey v. Berton, and *Quiller v. Newton* (*loc. cit.*).

The case of

The Queen v. Fenton, 1 Ad. & E. (N. S.) 480,
 was under a special statute.

Churchwardens are a *quasi*-corporation :

Prideaux on Churchwardens ;

Grant on Corporations, 604, 613 ;

2nd. Greata had no right to use Fry's name. He was not agent *ex necessitate* for Fry,

Storey on Agency, sect. 141 ;

nor was Fry joined for "conformity." A Court of Common Law will not, without going into the merits of the case, compel a non-assenting party to join in an action,

Com. Dig. "Attorney," B, 7.

What is the practice of the Ecclesiastical Courts in such cases is, it is clear from the judgment below, quite unknown.

If a churchwarden wrongfully refuses to join in a suit, he may be removed from his office,

Prideaux, 44, 45, 299 ;

Lamb's Office of Churchwarden, sect. 3.

He would be liable to spiritual censure.

3rd. The defendant can take this objection. His interest in defeating the suit is undoubted ; and should he be successful in his resistance to the rate, he has an interest in being able to resort to Fry for his costs, should Greata prove insolvent.

4th. The proxy was insufficient. The proxy in the Ecclesiastical Courts is analogous to the now abolished "warrant of attorney" in the Civil Courts,

Com. Dig. "Attorney," B, 7 ;

Com. Dig. "Amendment," E ;

3 Burn's Eccl. Law (9th ed.), tit. "Proctor," pp. 376, 378.

Want of a warrant of attorney was error. The letters of request are no part of the record.

The Queen's Advocate, in reply, urged—

There is no dispute as to the strict rule of Ecclesiastical Law as to proxies, as embodied in Canon 129, and modified by Order of Court 5 :

But in practice the rule has been relaxed,

Prankard v. Deacle (*loc. cit.*).

If the first proxy here was bad, the second cured the defect.

The letters of request are a part of the record. The Court below must be supposed to have an inherent jurisdiction to compel an unwilling party to proceed upon being indemnified. If not, there is no remedy in such a case as this. Neither a *mandamus* nor a *monition* would be granted. The assertions in Grant and Prideaux are not borne out by the cases upon which they profess to be founded.

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LORD CRANWORTH delivered the opinion of the Committee—

After stating the facts of the case down to the 18th of April, when Greata's proctor declared that Fry proceeded no further, and the defendant appeared under protest, his Lordship continued as follows :

At this stage of the proceedings the suit was clearly a suit by one churchwarden only. It was indeed contended at the bar that Fry was a party in obtaining the letters of request, and must therefore be treated as a party in the cause, until discharged by some order dismissing him, and we were referred to several cases in which it has been laid down that a party in a cause does not cease to be a party by merely alleging in Court that he proceeds no further. Of the soundness of these decisions we entertain no doubt. A person who embarks in litigation incurs liabilities in its progress, by the consequences of which, prospective as well as retrospective, he must be bound, until discharged by the Court. But in order to make this doctrine applicable, it was incumbent on the appellant Greata to show that Fry was at some time before the 18th of April, 1864, a party in the cause. And this he failed to do. It was contended that Fry, by joining in the letters of request, had become a party in the cause, but this is a mistake. It does not appear, except as may be inferred from the letters of request themselves, that Fry was a party to the obtaining of them. But, even if he was, they form no part of the cause. Letters of request are issued, not in a pending cause, but on an allegation that the parties applying for them intend to enter into litigation, and wish to go to the Superior Court at once *per saltum*. And when the Superior Court accepts the letters of request, and issues its decree citing the party complained of to appear, they are recited in the decree only for the purpose of showing how the Superior Court has acquired original jurisdiction. The cause originates to all intents and purposes in the Superior Court. The letters of request, when accepted, enable the Superior Court to authorise the persons who have obtained them to institute a suit, but they do no more, and till a suit is instituted in the Superior Court, litigation has not begun.

But it was further argued that, even independently of the letters of request, Fry must be taken to have been a party in the cause up to the 18th of April, 1864, for that on that day the proctor alleged, not that Fry had never been a party, but that he would proceed *no further*. These latter words, it was said, contained in themselves a negative pregnant, and showed that up to that time he had been a party proceeding in the cause. But, even if this were a reasonable inference, still it must be shown that they were the words of a person to whom Fry had given authority to speak or act for him ; and as no proxy from Fry had been exhibited, the words are inoperative against him, and he has a right to treat them as

the words of a mere stranger. On the first appearance of the defendant in obedience to the decree, he in substance objected that he was called on to answer a charge purporting to be made by Gresta and Fry, but which was really made by Gresta alone. The only answer as matter of fact to such an objection would have been the production of a proxy from Fry, and as no such proxy was or could be produced, the only question was one of law, whether the concurrence of Fry was necessary, *i.e.*, whether one churchwarden alone could sustain such a suit. We need not discuss this question; the case is too plain for argument, and was hardly contended for at the bar. In enforcing a demand in which two persons are jointly interested, whether beneficially or as trustees, each must, either as plaintiff or defendant, be before the Court, and the circumstance that the persons interested are churchwardens cannot make any difference.

It was, no doubt, from feeling that the law on this point was against him, that Gresta, after the defendant had appeared under protest, endeavoured to cure the defect insisted on, by exhibiting a further proxy which, though under the hand and seal of Gresta only, yet purported to appoint proctors to appear for Fry as well as for himself. And the second point urged for the appellants was, that this second proxy cured the defect insisted on.

The general rule of the Ecclesiastical Court requires every proxy to be signed by the party himself, or by some one duly authorised to sign for him. Neither of these requisites has been complied with here. No proxy was exhibited under the hand and seal of Fry, or of any person authorised to act for him. But necessity, it was urged, requires that in the case of two churchwardens, each should be deemed to be invested with an implied authority to use the name of the other in suits for the benefit of the parish, or at all events in suits for subtraction of church-rate—for that otherwise it might be impossible to collect the rate. There is, however, nothing to warrant such an argument.

It was endeavoured to show that such a power might be considered to exist by analogy to what is done in the Courts of Common Law, where a plaintiff can take on himself to join as a co-plaintiff the name of another person who stands in the position of a trustee for him as to the subject matter of the action. There the Court will in general permit the plaintiff, who alone is the party substantially interested, to go on using the name of the other plaintiff whose name is introduced for conformity, on the terms of full indemnity against costs being given to the party whose name is thus used. But this is only done when a special case has been made, showing that substantial justice requires such a course to be taken, and is never done in the case of two persons jointly interested beneficially in the subject-matter of the action.

In the case now before us no special circumstances

are stated, and the course pursued can only be justified on the assumption that in every suit for subtraction of church-rate, one churchwarden may always use the name of a co-churchwarden as a co-plaintiff without any authority from him. For such a proposition there is no warrant, either in principle or on authority.

It was argued that the result of this decision will be to prevent the possibility of recovering church-rates, if an obstinate churchwarden refuses to concur in a suit. Perhaps if such concurrence were corruptly, or even vexatiously, refused, there might be good grounds for removing the churchwarden from his office. But that question is not now before us. There is nothing to show that the non-concurrence of Fry has arisen from motives either corrupt or vexatious. His refusal to concur may have been the result of an honest desire to save the money of the parishioners. He may have been satisfied, for instance, that the rate is invalid, or that the person sued is insolvent. The contention of Gresta allows no exception for such cases.

On these grounds we have no hesitation in expressing our concurrence in the conclusion at which the learned Dean of the Arches has arrived, and we shall report to her Majesty that, in our opinion, this appeal ought to be dismissed with costs.

Lord Chancellor. } *Re* THE AGRICULTURIST INSURANCE COMPANY.
3, 4, 5 NOV. 1864. }
11 FEB. 1865. } SPACKMAN'S CASE.

Company—Discharge of Shareholder—Irregular Agreement with Directors—Lapse of Time—Acquiescence—Power to Compromise Actions.

If a shareholder claims to be discharged from a company by a transaction between himself and the directors, which he alleges has, though irregular, acquired validity by lapse of time and acquiescence, he must show that the transaction was fully made known to the company, or faithfully narrated in the books of the company, or reports of the directors, so that if ordinary attention had been used, it must have been observed by, and become known to, the rest of the shareholders.

*J S, and other shareholders in a company, agreed with the directors that they should pay 4000*l.*, and that thereupon the directors should, under the powers given them by the deed of settlement, declare their shares forfeited for the non-payment of a then pending call. The books and papers of the company, accessible to the shareholders, failed to show the real nature of the arrangement; but, after it had been carried out, J S and the others were no longer treated as shareholders, and several alterations were made in the business of the company, to which alterations they were not parties. Eleven years afterwards, the company being in course of winding*

up, an application was made to put J S and the others on the list of contributories:—

Held (reversing the decision of the MASTER OF THE ROLLS), that J S ought to be placed on the list.

At the time of the arrangement, actions for calls were pending against J S and the others. The directors had power to settle, compromise, and compound actions:—

Held, that the directors were not thereby empowered to release the defendants in the actions from their position as shareholders.

The Agriculturist Insurance Company was formed in the year 1845, and duly registered, under the 7 & 8 Vict. c. 110. Its object, as originally constituted, was the insurance of live stock against losses by disease, or other accidents.

In the year 1848 the company had fallen into difficulties, and several of the shareholders were opposed to its further continuance. Others, however, thought that its position might be improved; and eventually an arrangement was proposed for allowing the dissatisfied shareholders to leave the company. Under it, any shareholder was to be at liberty to withdraw, on paying a certain sum per share, varying according to the total number of shares held by him. These terms were made known to the shareholders by a circular letter from the secretary, and were approved of by an adjourned special general meeting, held at Chippenham, on the 13th of November, 1848. The directors were authorised to carry out the terms, which were thenceforth known as the "Chippenham arrangement." It was accordingly settled that the shares of the retiring shareholders should be transferred to paupers, and should, after the sums agreed upon had been paid, be made forfeited, on the ground of the non-payment of the balance of a call, which in fact was made for this very purpose, and eventually they were so forfeited. Rowland Brotherhood was one of the persons who retired under this arrangement. Proper entries, relating to these proceedings, were made in the books of the company accessible to the shareholders, and Rowland Brotherhood and the others thenceforth ceased to be treated as members.

Joseph Spackman was present at the adjourned special meeting at which the Chippenham arrangement was confirmed, and he strongly objected to it. In December, 1848, he and others unsuccessfully attempted to wind up the company. Their petition characterised the Chippenham arrangement as proceeding on a gross breach of trust by the directors. (See *Ex parte Spackman*, 1 Mac. & G. 170.)

Meantime, the directors brought actions against Joseph Spackman and the others, for calls which they had refused to pay. Pending these proceedings, negotiations were set on foot for allowing Joseph Spackman and the others to retire from the company. At length it was agreed, between Mr. Westmacott, who acted as solicitor for the directors, and Mr. Clarkson, on behalf of Joseph Spackman and the others, that they should

be allowed to retire, on payment of sums amounting to 4000*l*. The sum which Joseph Spackman was to pay on this arrangement, was considerably less than the sum which he would have had to pay under the Chippenham arrangement.

The 4000*l*. were paid, the actions were discontinued, and, in accordance with a plan settled between Mr. Westmacott and Mr. Clarkson, the shares of Joseph Spackman and the others were, by the directors, declared forfeited for the non-payment of the balances of the above-mentioned call; and the directors affixed the company's seal to a deed, dated the 26th of June, 1849, by which the company covenanted not to exercise the powers given by the deed of settlement, under which the shares might, in certain events, revert in the defaulting shareholders.

The 198th clause of the deed of settlement authorised the directors to bring actions against shareholders in respect of their liabilities to the company, and, at any time afterwards, to stay, compromise, or compound the same.

An order for winding up the company was made in 1861, and attempts were made to impeach the Chippenham arrangement, and place Mr. Brotherhood and others on the list of contributories; but these attempts were unsuccessful. (See *Brotherhood's Case*, 31 Beav. 365.)

Subsequently, an application was made to place Joseph Spackman on the list, which was dismissed by the Master of the Rolls. (See 12 W. R. 1133.)

The official manager now appealed.

Sir H. Cairns, Q.C., E. T. Simpson, and Bush, for the official manager; and *Daniel, Q.C., and G. Long*, for the creditors' representative.

1st. The pretended forfeiture of the respondent's was a collusive and fraudulent proceeding, and had it been immediately questioned, could not have been supported.

2nd. If so, lapse of time will not aid it, inasmuch as the entries in the books all purport to relate to a *bona fide* declaration of forfeiture *in invitato*. The real nature of the transaction remained concealed from the shareholders, and only came to the knowledge of the official manager a short time before these proceedings were commenced.

Stanhope's Case, 3 De G. & Sm. 198.

3rd. It is contended that the power of compromise given to the directors authorised this arrangement. But such a power merely made them *domini* of the subject-matter demanded in the actions, and did not give them power to release the defendants from their liabilities as shareholders, which were not in question in the actions.

The Attorney-General and Pearson, for the respondent.

1st. The forfeiture of the shares being made in due form, was legally effective,

Stevenson v. Newnham, 13 C. B. 225, 222.

2nd. The Court would not have interfered with this legal effect, even if speedily appealed to, inasmuch as the transaction was warranted by the power which the adoption of the Chippenham arrangement must be considered as having conferred upon the directors, of doing all acts necessary for the complete carrying out of that scheme.

3rd. *A fortiori*, such an equity cannot now, after the lapse of eleven years, be asserted. For even if the entries in the books were not of themselves sufficient to disclose the entire transaction, yet, coupled with the knowledge of affairs then possessed by the shareholders, they would have conducted any one who chose to inquire to a knowledge of all the proceedings. Since 1849 Mr. Spackman has never been treated as a shareholder, and extensive alterations have been made in the business and regulations of the company.

Sir H. Cairns, Q.C., in reply.

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THE LORD CHANCELLOR said: By the deed constituting this company, each shareholder covenanted with the trustees, and with every other shareholder, that they, and the persons who might become shareholders should, whilst holding any share or shares in the company, be and continue a company by and under the name of the Agriculturist Cattle Insurance Company, for the term of fifty years, unless sooner dissolved. The question is, whether the respondent who executed the deed has been released from the binding obligation created by this covenant.

The case on the part of the respondent is, that his shares were duly forfeited in the month of June, 1849, and that thereupon he ceased to be a member of the company, and further, if there was any irregularity in the exercise of the power of forfeiture, yet that the proceedings, and the consequent release of the respondent, have been acquiesced in by the shareholders for a period of eleven years prior to the order for winding-up the company, and ought not now to be disturbed.

On the other hand it is contended by the official manager that the alleged forfeiture of the respondent's shares was a proceeding wholly collusive and unreal—the real transaction being an agreement, between seven shareholders (including the respondent) and the directors, that in consideration of a sum of 4000*l.*, to be paid by such shareholders to the directors, they (the directors) should release them from all existing and future liabilities to the company, and would effect such release by the instrumentality of the clause of forfeiture. This, the official manager contends, would have been an abuse of the power of forfeiture, even if it had been in form observed, and a fraud upon the other shareholders.

The appellant also contends that if a transaction which is irregular, and much more if it be collusive, and therefore fraudulent, is attempted to be supported by the plea of acquiescence and lapse of time, it is incumbent on the party setting up such defence to

show that the transaction was fully made known to the company or faithfully narrated in the books of the company, or reports of the directors, so that if ordinary attention had been used, it must have been observed by, and become known to, the rest of the shareholders. If a shareholder depends for his discharge from the company on an irregular transaction with the directors, he cannot, as the appellant contends, be permitted to insist that it was the duty of the directors to state the transaction to the shareholders, and that he trusted to them to do so. It certainly is their duty to do so, but if that duty be not discharged, the shareholders, as the appellant insists, must take the consequences. If a declaration of forfeiture really proceeds upon, and is the result of, a collusive agreement, but is entered by the directors in the books of the company as if it were a *bond fide* adverse proceeding, the entry is a false statement, involving a fraudulent concealment of the truth, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances of imposition on the other shareholders that the shareholder who sets up the forfeiture can make a case of acquiescence, or derive any benefit from lapse of time whilst the truth remains unknown.

In the propositions I have thus stated, I have considered the arguments for the official manager, and to these propositions I give my assent. The question is whether they apply to the case before me. Upon an examination of the evidence, I think the facts warrant the statement sworn to by the official manager. He states in his affidavit that all the transactions which constituted what has been called the Chippenham arrangement (and on which Mr. Brotherhood and others retired), were made known to the shareholders at the time, and are truly stated in the books and papers of the company, so that anyone reading the books and papers would ascertain the facts; but that with respect to the respondent and the persons who retired with him, the facts were not made known to the shareholders, nor did the books or papers of the company give any information as to the terms of the actual arrangement. In proof of this the official manager states that, notwithstanding his examination of all the books and documents, he remained ignorant of the real truth until he obtained access to the papers of Mr. Westmacott, deceased: a solicitor, who although he was not the solicitor of the company, yet strangely enough appears to have been employed by the directors as their private or peculiar solicitor in arranging the terms on which the respondent and the six other shareholders should be released by the directors, and their shares made to appear to be forfeited.

The real facts of the case are now clear enough, and there is no controversy about them.

The respondent and the six other shareholders associated with him refused to accede to the Chippenham arrangement.

The respondent presented a petition to the Lord Chancellor for an order to wind up the company. This petition was dismissed, first by the Vice-Chancellor, and afterwards, on a rehearing, by the Lord Chancellor, with costs, in the month of April, 1849.

It was part of the concerted plan which formed the Chippenham arrangement, that the directors should make a call of 4*l.* per share upon the shareholders, in order that, upon the ground of nonpayment of this call, the shares of the shareholders who were to retire from the company under that arrangement might be forfeited. The call was accordingly made on the 21st of November, 1848. It was made in pursuance of resolutions passed at the adjourned special general meeting held on the 13th of November, 1848, and was a proceeding wholly irregular and collusive, on which, in my opinion, no action could have been successfully maintained against any dissentient shareholder. This call is described in the petition presented by the respondent as a gross breach of trust on the part of the directors. The respondent, therefore, was well aware of the invalidity of the call, and it was frequently urged by his solicitor in his letters, that the company was not in a condition to enforce any calls against the shareholders. Nevertheless, it was finally agreed in the month of May, 1849, that the nonpayment of this invalid call, or of a previous call of 1*l.* per share, which was included in the call of 4*l.*, and was equally invalid, should be made the ground for forfeiting the shares of the respondent and the six other shareholders.

It appears that shortly after the order dismissing the respondent's petition in April, 1849, a correspondence was begun between Mr. Clarkson, the solicitor of the respondent, and Mr. Westmacott, the solicitor for the directors, to settle the terms on which the seven shareholders should be allowed to retire from the company. The condition of the company, at the time when the terms were finally agreed on, appears to have been this: All the paid-up capital had been spent, and the company was in debt to the amount of 21,000*l.*; for it is stated that the debts, amounting to 17,000*l.* at the time of the Chippenham arrangement, had been in May, 1849, increased by the sum of 4000*l.* The shares held by these seven shareholders appears to have been about 2,500, and the amount due in respect of the call of 4*l.* would have been about 10,000*l.* In this state of things the continuance of seven solvent shareholders in the company was of importance to the other members. But the directors finally agreed, at the end of the month of May, 1849, to release these seven shareholders, and allow them to retire from the company on payment of the sum of 4000*l.* This object was to be accomplished under colour of the provisions for the forfeiture of shares for nonpayment of calls contained in the deed of settlement. But inasmuch as the clauses of forfeiture, if they had been duly pursued, would not have been effectual for the complete discharge of the share-

holders, it being stipulated and agreed by the 126th clause of the deed of settlement, that a shareholder might redeem his shares after they had been forfeited, on payment of such sum of money, by way of fine, as the board of directors should think fit; and inasmuch as it was also provided by the 182nd clause of the deed of settlement, that when any shares should have been forfeited for nonpayment of calls, the directors should not sell more of such shares than might be sufficient to pay the amount payable by the shareholders in respect of such shares, and legal interest thereon, and that all shares which should remain should again revert to and become the property of the shareholders, it was agreed that the directors should accept a release from the seven shareholders of all their estate, right, title, and interest of, in, or to, their respective shares in the capital of the company, and all future dividends in respect thereof, and that, in pursuance of the agreement, and in consideration of the release, the company should for themselves and their successors covenant, declare, and agree with the seven shareholders that the company should not, nor would, nor should, or would the directors, discharge the shares from forfeiture, in pursuance of the 126th clause of the deed, nor sell the shares to any person, or do any act whereby the shares should be reserved, or restored, or revert to the shareholders, or whereby the shareholders might be called on to pay the balance of the call, after deducting the purchase-money, unless the directors were able to sell the whole of the shares belonging to any one of the seven shareholders, which they were thereby empowered to do, notwithstanding the provisions of the 182nd clause of the deed of settlement. Such are the chief provisions of the deed of the 26th of June, 1849, which is expressed to be made between the company and the seven shareholders, and to which the directors affixed the seal of the company.

Before the execution of this deed, and on the day on which the 4000*l.* or a considerable part of it was paid, viz., the 6th of June, 1849, the directors held a board meeting, at which they passed a resolution in these words, "by reason of the neglect or refusal on the part of the under-mentioned holders of shares in the above company (being the seven shareholders) to pay the instalment or subscription of 4*l.* per share which has been called for in respect thereof, under the provisions contained in the company's deed of settlement, within two calendar months after the 23rd day of December, 1848, the day fixed for the payment thereof, the shares which are held by the under-mentioned shareholders, or to which they are entitled in the company, numbered opposite their respective names hereunder written, and all money paid to the company thereon, and all the benefit and advantage whatsoever attending the same, shall henceforth be forfeited to the company, and such shares are forfeited accordingly."

There was a further resolution that notice of the declaration of forfeiture should be sent to the seven

shareholders, and it was further resolved that the seal of the company should be affixed to the resolutions. These entries, made by the directors in the minute-book of their meetings, were never produced or made known to the shareholders. The only entries or documents relating to the transaction which were made known to the shareholders, or to which they had access, appear to have been the following—

First. The shares of the seven shareholders were returned to the public Registration Office as having been forfeited. Secondly. In the share register-book of the company, as corrected up to the 1st of November, 1848, the names of the seven shareholders, and the number of shares held by them, appear, but in the next alphabetical list of shareholders in the same book, as corrected up to the 1st of November, 1849, the names are omitted. Thirdly. In the balance-sheet of the company from the 1st of July, 1848, to the 31st of December, 1848, there is this item, "cancelled shares 11,310*l.* 10*s.*," the particulars of which appear to be given in the journal under date 31st of December, 1848. These entries related to shares cancelled under the Chippenham arrangement. In the next balance-sheet, from the 1st of January, 1849, to the 30th of June, 1849, is a similar entry, "cancelled shares 13,857*l.* 10*s.*," the particulars of which are also given in the journal under date 30th of June, 1849, where, classed with other shareholders who had come in under the Chippenham arrangement, are the names of these seven shareholders, and the number of shares held by each of them, and also sums of money set opposite the names, which represent as, I conclude, the sums payable by each of the seven shareholders under the call of 4*l.*, and which sums greatly exceed the 4000*l.* that was actually paid, and of which sum of 4000*l.* there is in these documents no mention whatever.

It is plain that, to every shareholder, acquainted as they all were with the Chippenham arrangement, these entries would convey the impression that the seven shareholders had also come in under that arrangement, and that their opposition had been ended by the dismissal of their petition. If any other conclusion was derived, it must have been that the shares of the seven shareholders had been duly and regularly forfeited.

With respect to the application of the 4000*l.*, the facts have an important bearing on the case. It would seem that Mr. Clarkson, the solicitor of the seven shareholders, was very properly desirous that the money to be paid by his clients should be applied in payment of part of the large debt of the company; but before the final agreement, Mr. Clarkson received from the solicitor of the directors, a letter dated the 29th of May, 1849, in which Mr. Clarkson is told that the directors had come to "the conclusion, under all the circumstances, that they would be justified in accepting his offer of 4000*l.*, provided that the matter is carried out immediately, and no unne-

cessary restrictions were put upon the deposition of the money, as, if that were the case, no benefit could accrue from the payment."

The money accordingly appears to have been paid over to the secretary, and placed under the control of the directors, who appear to have at once applied a considerable part of it in payment to themselves of fees, allowances, and law charges. At the time of such payment of the 4000*l.*, the balance standing to the credit of the company at its bankers did not exceed 73*l.*, and there could be little expectation of the sums applied by the directors to their own use ever being otherwise received.

Upon a review of these circumstances, it is plain that the real transaction was not an adverse sentence of forfeiture, but a collusive contract between the directors and the shareholders, that, in consideration of a sum of 4000*l.* to be paid by them to the directors, they should be released from all present and future liabilities, and from their position as shareholders in the company. To effect this object, part of the provisions of the clause of forfeiture was resorted to, but the rest of the provisions which would be inconsistent with the design, the directors covenant not to use or apply.

That the shareholders bargained with the directors for a release from the company, and all liabilities as shareholders, is in effect admitted by Mr. Clarkson in the 17th and 18th paragraphs of his affidavit.

There can be no doubt that the actual contract was such as the directors had no power to make. The transaction was an abuse of the power of forfeiture even if it had (which was not the case) been conducted in conformity with the provisions of that power. There can also be no doubt that it was the duty of both parties to this irregular proceeding to make it known to the shareholders of the company. If it had been immediately challenged, the validity of what was done could not have been maintained. The question then is, whether that which was invalid and improper can derive validity from the fact that by a breach of duty it has been for eleven years successfully concealed? If a shareholder collude with the directors in an improper transaction to the prejudice of the other shareholders, the shareholder and the directors stand on an equal footing of liability, and it could hardly be suggested even in argument, that directors can in any irregular transaction derive any benefit from their own suppression of the truth. It is the first duty of this Court to require perfect truth and sincerity from all who stand in a fiduciary capacity. Concealment or suppression of the truth by a trustee is falsehood, and wherever there is falsehood there is fraud.

This case, therefore, in my judgment, depends on one inquiry, was this invalid transaction fully made known to the shareholders? The answer must be, that it was concealed from them. If so, it can derive no confirmation from lapse of time during such con-

concealment. It was contended by the Attorney-General that the declaration of forfeiture was good at law, and that the legal obligation of the covenant was therefore at an end; but I am not of that opinion, for to make a good legal forfeiture, the direction and requisites of the power of forfeiture must be strictly and *bond fide* observed, and the call which the shareholder fails to pay must be legal, and capable of being enforced. If the power has not been strictly followed, there is no forfeiture either at Law or in Equity; and if the letter of the provision has been strictly observed, but the exercise of the power is the result of a collusive and unauthorised agreement between the parties, then there is no valid execution in Equity.

The Master of the Rolls appears to have thought that what was done by the directors might be warranted by the power to compromise actions contained in the 198th clause of the deed of settlement, but I cannot concur with his Honour in this opinion, or hold that, in an action brought against a shareholder for calls, the directors under the power of compromising or compounding for such demand, could release the defendant from his position as a shareholder in the company. The Master of the Rolls relies on the facts that during eleven years the respondents have not been treated as shareholders, and notices have not been sent to them of meetings at which the assembled shareholders make important changes in the constitution of the company; but all this was the result of the belief of the shareholders that the shares of the respondent had been duly forfeited, and that they had *bond fide* ceased to be shareholders, and that belief was produced by misrepresentations and concealment of the truth by the directors, for which the respondent is equally responsible. The order of the Master of the Rolls must therefore be reversed, and the respondent's name placed on the list. The official manager, and the creditors' representative, will have their costs out of the estate.

Lord Chancellor. } *Re LEVEY.*

19 JAN. 11 FEB. 1865. } *Ex parte TOPPING.*

Bankruptcy — Partnership — Proof by Co-Partner—Surplus.

Where two co-partners were jointly and severally adjudicated bankrupt, and one of them was, before and at the time of the adjudication, indebted to the other on a private account, not connected with the partnership dealings, and the representatives of the joint estate admitted at the bar that, whether the separate estate of the creditor-partner was or was not allowed to prove against the separate estate of the debtor-partner, there would be no surplus of the latter estate, such proof was allowed, subject to being expunged, in case it should eventually appear that, after expunging it, there would be a surplus of the estate of the debtor-partner.

For some time previous to the year 1864, George

Levey and Charles Robson carried on business in partnership as printers and shippers.

About the year 1834, Levey advanced and lent to Robson a sum of money, out of his own private money, to enable the latter to place a larger capital in the business. On the 19th of January, 1864, Levey & Robson were adjudicated bankrupts, and Charles Topping was chosen one of the assignees. As such, he tendered a proof on behalf of Levey's separate estate, against the separate estate of Robson, for a sum of 404*l.* 11*s.* 6*d.*, due in respect of the above-mentioned advance. The proof was rejected by Mr. Registrar Winslow, acting for Mr. Commissioner Forblanque, and this appeal was brought against his decision. It was admitted, for the purposes of the appeal, that the debt due to Levey was not barred by the Statute of Limitations.

It was also admitted at the bar, on behalf of the assignees, that even if the proof were rejected, Robson's separate estate would still be insufficient to pay his separate creditors in full.

De Gez, for the appellants.

The rule that a partner may not prove in competition with the separate creditors of his co-partner, was introduced for the benefit of the joint creditors, who are entitled to share in the surplus, if any. It ceases if the joint creditors have all been fully paid, and, by parity of reasoning, it ought to cease in a case where, as here, there can be no surplus of the separate estate, and the only effect of it will be, to pay the creditors of one partner with the money of the other.

He cited, and commented on,

Ex parte Ellis, 2 Gl. & J. 312;

Ex parte Carter, 2 Gl. & J. 233;

Ex parte Moore, 2 Gl. & J. 166;

Ex parte Broome, 1 Rose, 69;

Wood v. Dodgson, 2 M. & S. 195;

1 M. & Ayr. B. L. 274;

Deacon's Bankruptcy, 850 (3rd ed.);

Lindley on Partnership, 1008, 1011.

Martineau, for the assignees made, the admission referred to above.

Robertson Griffiths, for a separate creditor of Robson.

The rule has been always laid down in general terms without the exception contended for. Indeed hardly in any case can it be possible to say that by no possibility will there be a surplus.

De Gez, in reply.—In the present case the assignees of the joint estate admit the impossibility of a surplus.

11 FEB. 1865.

THE LORD CHANCELLOR said—The question was, whether if there had been an adjudication of bankruptcy against two co-partners, and one of them was indebted to another, the separate estate of the creditor-partner could be admitted to prove against the separate estate of the debtor-partner, in a case where it was

clear that, whether such proof were admitted or not, there would be no surplus of the separate estate of the debtor-partner available for the benefit of the joint creditors.

Now the rules which regulated proof in such cases were an artificial system derived from those observed by this Court in the marshalling of assets, and they were established by an order of Lord Loughborough, made in 1794. Separate accounts were directed to be kept of the two estates, and if there was any joint estate the joint creditors were not in the first instance to share in the separate estate, but were to wait till the separate creditors were paid in full, and then to be admitted to participate in the surplus. It was consequently held that one partner could not prove against his co-partner, inasmuch as such proof would in general diminish the surplus of the estate of the debtor-partner, and thus the creditor-partner would come into competition with the joint creditors. The general rule, therefore, was that no partner could prove against the estate of a co-partner, and the question was, whether that rule was to be confined within the limits to which its reason and principle would restrict it, or whether it was to be carried out in every case, even although the reason and principle no longer applied. Several cases on the point were found in the second volume of Glyn & Jameson's Reports. But in all those cases the debt had arisen out of partnership transactions, or had accrued after the adjudication.

But here the case was different, for the debt sought to be proved against the estate of the co-partner was a debt arising from an independent contract, apart from the partnership dealings, and existing at the time of adjudication. It was also admitted, and the present decision was based on that admission, that by no possibility could there be any surplus of the separate estate of the debtor-partner. Here, therefore, it was reasonable and just that the rule should not be so extended as to comprehend a case beyond its original principle; and if it was clear that there could be no surplus of the estate against which the proof was tendered, it would be unreasonable that the proof should be rejected. It was said, and with truth, that the effect of so extending the rule in the present case, would be to pay the creditors of one partner with the money of another; and it was also urged that the joint creditors would often be losers instead of gainers by making its application universal. If, for instance, there were two partners, one of whom had a separate estate of 10,000*l.*, and owed 10,000*l.* to his separate creditors, exclusive of his debts due to his co-partners, then, if the latter were not admitted, his separate creditors would be paid in full; but if he owed a co-partner 10,000*l.*, and the proof were admitted, the separate creditors would only get 10*s.* in the pound. Suppose, now, the other partner were indebted to the amount of 1000*l.* and had no assets but the debt due from his co-partner: the result would be that, if the proof were admitted, there would be a surplus of

4000*l.* available to the joint creditors, whereas, if the rule were adhered to, for the supposed benefit of the joint creditors, it would, in fact, deprive them of 4000*l.* Many other cases might be suggested in which such a rigid adherence to the rule would work injustice.

Here, therefore, was a case in which a proof by one partner against the separate estate of his co-partner ought to be admitted, but inasmuch as contingencies might arise, bringing to light undiscovered assets, the proof must be made liable to be expunged, if it should eventually turn out, that there would thus be a surplus of the separate estate of the debtor-partner.

The assignees would take their costs out of the respective estates, but no costs would be given to the creditor who had appeared separately.

Lords Justices. } REDE v. OAKES.
17 FEB. 1865.

Vendor and Purchaser—Deposit.

Order that vendor return to purchaser his deposit cancelled, to enable the latter to recover at law his deposit, with interest.

In this case (which is fully reported, *ante* 5 N. R. 203), upon the application of the defendant, who did not wish to prejudice his right to recover at law the deposit with interest, the direction as to the return of the deposit was struck out of the minutes of the order.

Lords Justices. } HEFBURN v. LORDAN.
17, 18 FEB. 1865.

Injunction—Nuisance—Indictment.

In this case (the report of which in the Court below will be found, *ante* 5 N. R. 301), at the suggestion of the Court, the parties ultimately agreed upon the following—

Minute.—By consent dissolve the injunction, the defendant undertaking not to bring any more jute upon the premises, and to remove that which is there now before the 24th of March; without prejudice to any question in the cause. The costs of this application to be dealt with at the hearing by the Vice-Chancellor.

Master of the Rolls. } DAVIES v. OTTY.
8, 10, 13, 15 FEB. 1865.

Trust—Statute of Frauds—Fraud—Resulting Trust—Illegal Deed—Affidavit of a Deceased Person—Absence of Cross-examination.

D, under a misapprehension of being liable to a conviction for felony, executed a deed, which purported to be an absolute conveyance of his property to O for a valuable consideration, but which was proved by parol

evidence to have been executed on the understanding that O should hold the property at D's disposal. The consideration was never paid, and D remained in possession, and made payments to a building society in respect of the property. O denied the trust and refused to reconvey:—

Held, 1st. That O's denial and refusal were a fraud which excluded the operation of the Statute of Frauds:

Held, 2nd. That there was a trust by construction of law, within the 8th section of the Statute of Frauds.

A witness who had made an affidavit, died three days after it was sworn, without there having been any opportunity for cross-examination:—

Held, that, under the circumstances, the affidavit might be read, subject to deduction from its weight on account of the absence of any opportunity for cross-examination.

This was a motion for decree in this suit, reported on demurrer, 4 N. R. 5, 256, where the object of the suit and the nature of the bill are stated. The bill had been amended, but the paragraphs set out in the previous report were substantially the same. The following facts require to be now stated.

The plaintiff's first wife, Ann, whom he married in 1836, eloped in 1844 with a paramour, and was not heard of by the plaintiff until fourteen years afterwards. In 1854, the plaintiff, believing his first wife to be dead, married Susannah Otty, the mother of the defendant by her first husband.

In January, 1860, the plaintiff, who lived in the county of Chester, heard that his first wife was living at Newton, in Montgomeryshire, and was there chargeable to the parish. In August, 1862, the plaintiff, at the instance of the guardians of the poor, who had heard from the wife that her husband was alive, was summoned before the magistrates for an order to pay to the guardians the amount they had expended in maintaining his wife; but on an investigation of the circumstances the summons was dismissed. When the plaintiff heard that his first wife was alive, he was afraid of being convicted of bigamy. But in fact, he had not heard of his first wife for seven years previous to his second marriage. He thought also, that at any rate it would be better for him to change his residence, but he did not do so, finding that he still retained the respect and goodwill of his neighbours. Whilst under the misapprehension as to his liability to a conviction for bigamy, he executed the deed in question of the 17th of January, 1860.

According to the bill, the plaintiff had bought the property for 340*l.*, made up of 70*l.* his own savings, 20*l.* borrowed from the defendant on a promissory note, and 250*l.* part of the 420*l.* advanced by the building society on mortgage. The defendant promised to dispose of the property according to the plaintiff's wishes, and to reconvey it when required to do so. The plaintiff had been pressed by the defendant to pay, and had paid the 20*l.* due on the promissory note.

It was suggested that the object of the conveyance was either to avoid the forfeiture which the plaintiff believed would result from a conviction for bigamy, or to escape the enforcement of any payment to the guardians for the maintenance of his first wife.

The defendant, in his answer, alleged that the transaction was what the deed purported to be, an absolute sale to him for 20*l.*, which was an adequate consideration, and was to be paid by his forbearing to sue on the plaintiff's promissory note. The land was bought with 100*l.*, belonging to the defendant's mother, and for that reason the plaintiff wished to transfer the property to the defendant. The defendant paid Mr. Gill the solicitor 7*l.* 3*s.* 4*d.*, as the expense of the conveyance to him; and as the rents were nearly equal to the subscriptions payable to the society in respect of the shares, he appointed the plaintiff as his agent, to receive the rents and pay them to the society as his (the defendant's) subscriptions. He had assumed that Mr. Gill, who was also solicitor to the society, would do everything necessary to complete the transaction, and as soon as he found, from a list of members published in a report of the 29th of January, 1864, that the shares had not been transferred, his solicitor requested Mr. Gill to make the transfer, which he declined to do. The amount of the promissory note, the mortgage-debt, and covenant of the defendant in the deed, were the consideration. The promissory note was in his possession, and had not been paid.

Susannah Otty had made an affidavit, which in all respects supported the plaintiff's case, on the 28th of August, 1864, and had died on the 1st of September following. The affidavit was filed with the rest of the plaintiff's affidavits on the 14th of December, 1864, on which day also notice of motion for decree was given. In consequence of her death, the defendant had had no opportunity of cross-examining her. The affidavit was objected to, but ultimately admitted.

Baggallay, Q.C., and *H. M. Jackson*, for the plaintiff.

1st. The deed was executed under a misapprehension as to the state of the law, and the Court will relieve on the ground of mistake, as in

Childers v. Childers, 1 De G. & J. 482;

Birch v. Blagrave, 1 Amb. 264.

2nd. These cases also show that, although an illegal transaction was contemplated, yet if no fraud on the law was actually committed, the Court will give relief, and to the same effect are

Platamons v. Staple, G. Coop. 250;

Ward v. Lant, Prec. Ch. 182.

The present case is stronger, for the plaintiff could not have been convicted, and therefore the conveyance never could have been illegal. The purpose of the deed having failed, the donee has a *locus penitentie*.

3rd. The Statute of Frauds is excluded by part performance: that is, by the acts of the parties being

such, as to be explained only by referring them to an agreement or a trust,

Lincoln v. Wright, 4 De G. & J. 16 ;

Dale v. Hamilton, 5 Hare, 369 ; 2 Phill. 266.

4th. Though the defendant is the legal owner, the plaintiff paid the money, so that there is a constructive trust in the plaintiff's favour within the 8th section of the statute.

5th. The Statute of Frauds is not meant to cover fraud, and in such a case the Court will relieve,

Story's Equity Jurisprudence, § 1522 ;

Lincoln v. Wright, 4 De G. & J. 16, 19 ;

Dale v. Hamilton, 2 Phill. 266.

6th. The shares are personal estate to which the Statute of Frauds does not apply. And in the case of the land we are at any rate entitled to the alternative relief prayed—viz., a lien on the land for what we have paid.

Hobhouse, Q.C., and *W. W. Cooper*, for the defendant.

1st. It was intended, in the present instance, that the property should really change hands. In the cases cited by the plaintiff it was not so intended. Here there was a bargain. In the cases cited, the deeds emanated from the grantor alone, and the grantee knew nothing about them. The only exception was in *Platamone v. Staple* (*loc. cit.*), but there the bill was dismissed at the hearing (1 De G. & J. 486 ; 2 B. & Al. 269), and that, as well as the others, turned on the question of intention.

The result of the cases is, that where a transaction takes place in contemplation of some ulterior object which is not attained, and the transaction is incomplete, the Court will not interfere in favour of the grantee,

Cecil v. Butcher, 2 Jac. & W. 565.

In the present case, to accomplish the plaintiff's objects, it was necessary for him to denude himself of his property ; if any trust in his favour were left, the object of baffling the guardians or avoiding forfeiture, would not be accomplished. And, therefore, this fell within those cases where a person who wished to transfer property for a particular purpose has been held to have intended to part with the beneficial interest,

Childers v. Childers, 3 K. & J. 310,

a case which was altered on appeal by the discovery of the letter.

Besides, when persons have agreed to cheat the law the Court will not interfere in favour of either party,

Brackenbury v. Brackenbury, 2 Jac. & W. 391 ;

Cecil v. Butcher, 2 Jac. & W. 565 ;

Groves v. Groves, 3 Y. & J. 163 ;

Childers v. Childers, 3 K. & J. 310, 316 ;

and here the defendant says he was an innocent party.

2nd. The Statute of Frauds is fatal to the plaintiff's claim unless its operation is excluded by (a) constructive trust under section 8, (b) fraud, (c) part performance.

(a). The plaintiff alleges a trust not by construction of law but *ex contractu*.

Such a contract cannot be proved by parol evidence,

Bartlett v. Pickersgill, 1 Eden, 515 ; 1 Cox, 15.

In this case no money was paid, or any trust declared as to part, so as to bring it within the rule in,

Lloyd v. Spillett, 2 Atk. 148, 150.

Parol evidence was also excluded in,

Leman v. Whitley, 4 Russ. 423 ;

Irnham v. Child, 2 B. C. C. 92.

To exclude the operation of the statute, the terms of the trust must be shown, for otherwise the evils against which the statute is directed, arise,

Smith v. Matthews, 3 De G. F. & J. 139 ;

Gascoigne v. Thwing, 1 Vern. 366 ;

Groves v. Groves, 3 Y. & J. 163.

(b). It is true that the statute was not meant to cover fraud, but if fraud means the denial of a trust, the statute would never apply ; but the statute contemplated the existence of a trust and destroys it. Such a meaning of fraud was rejected in,

Montacute v. Maxwell, 1 P. W. 618 ;

Wood v. Midgley, 5 De G. M. & G. 41.

The case of *Lincoln v. Wright* is distinguishable. Moreover, it turned on the 4th section. If it applies to the 7th section, it overrules

Smith v. Matthews (*loc. cit.*),

and many other cases. The 4th section applies strictly to actions alone, and has been greatly modified in Equity by the Court applying its own doctrines to it, but it is otherwise with the 7th section.

(c). For the same reason the doctrine of part performance does not apply to cases under the 7th section as this is. The case of,

Dale v. Hamilton, 5 Hare, 369,

turned on the questions of possession and partnership, not of part performance : while that of

Lincoln v. Wright, 4 De G. & J. 16,

turned on the impossibility of explaining the possession of the land without presuming a beneficial interest. We explain the plaintiff's possession and the payments made to the building society.

Childers v. Childers, 1 De G. & J. 482,

was decided on the ground of mistake, as on appeal the letter took the case out of the statute.

3rd. They cannot have the alternative relief asked by this bill, as they cannot both affirm and disaffirm this deed,

Lindsay v. Lynch, 2 Sch. & Lef. 1 ;

Wright v. Wilkin, 4 De G. & J. 141 ;

Cawley v. Poole, 1 H. & M. 50 :

and they cannot introduce a secondary claim so as to obtain relief on that, if they fail on the main question,

Kendall v. Beckett, 2 Russ. & My. 88.

We should have been willing to pay the amount of the lien without suit. If, therefore, they fail on the main point, they must at any rate pay the costs of the suit.

4th. The case of the shares and land is one, and the Statute of Frauds excludes the parol evidence on which the whole case rests.

Baggallay, Q.C., in reply, as to the effect of the Statute of Frauds.

The Statute of Frauds does not apply—

1st. Because of the part performance of the parol agreement.

(a). Cases of trust, when arising as here by contract, come within the 4th section, because in cases of contract the writing must be signed "by the person to be charged therewith;" in cases not of contract, it is sufficient that the writing under the 7th section should be signed "by a person able to declare such trust."

(b). The doctrine of part performance applies to the 7th as well as to the 4th section. And as the plaintiff has performed the duties imposed by the deed on the defendant, there has been part performance of what we say the real agreement was. It is on all fours with *Lincoln v. Wright* (*loc. cit.*), and *Childers v. Childers* (*loc. cit.*).

2nd. Because there was a resulting trust within the 8th clause. The plaintiff paid the money, both the 20*l.*, and the sums to the building society, so that the case comes within

Lloyd v. Spillett (*loc. cit.*).

3rd. Because of mistake. The defendant admits that the deed was executed under a misapprehension. The purpose of it was never answered, and it is thus within the cases cited on the opening. And the deed would have been void against the Crown.

4th. Because of fraud,

Lincoln v. Wright, 4 De G. & J. 16.

We ought not to pay the costs, for the defendant has denied our case, when he might have pleaded the Statute of Frauds. He does not come into Court with clean hands.

15 FEB. 1865.

THE MASTER OF THE ROLLS said, that the evidence of Susannah Davies must be admitted. It appeared that her evidence was given on the 28th of August of last year, and she died two or three days afterwards, so that it was totally impossible to cross-examine her; but there being no impropriety, and nothing wrong in examining her, and in fact no keeping of her out of the way to prevent her being cross-examined, he could not exclude her evidence on the sole ground that there had been no opportunity of cross-examination. He must treat it in exactly the same way as he should the evidence of any other witness, who from any cause whatever had either not been cross-examined, or whom it was impossible to cross-examine; that is to say, look on it as less satisfactory, and give the other side the benefit of observing that there had been no cross-examination. She was speaking also of her own son in the matter—her son by the first marriage—and distinctly supported the

plaintiff's view of the transaction, and contradicted that of the defendant. Another witness also, who might have, but had not been cross-examined, gave exactly the same evidence. On the evidence his Honour thought, that the object of the deed was plain, and that the defendant had acquiesced in that object. Assuming that there was nothing illegal in the transaction, the matter stood thus: there was an apprehended difficulty that the plaintiff was afraid of getting into, and he transferred the whole of the property to the defendant, upon an agreement by him that he would retransfer that property; but when the time came, the defendant refused to transfer it. There was no consideration paid for it. The consideration of 20*l.* mentioned in the deed, was in point of fact never paid; for it appeared by the evidence, that the plaintiff's promissory note, which the defendant held, and the non-payment of which was said to be the consideration, was actually paid by the plaintiff, by instalments of various sums. Under these circumstances, his Honour was of opinion, that, to use the expression of one of the witnesses, "it was not honest to keep the lands." If so, that was a case in which, in his Honour's opinion, the Statute of Frauds did not apply, for that statute could not be set up as a ground for allowing a person to get rid of his engagement. He thought also that this view of the case was confirmed by all the subsequent transactions of the parties. It was true that nothing was said at the time to Mr. Gill, the solicitor, and he knew nothing about it; but the rest of the evidence distinctly proved the plaintiff's account of the transaction, and in point of fact, the plaintiff had been allowed to remain in possession of the property, and had paid all the instalments to the benefit building society. These payments made by the plaintiff brought the case within the 8th section of the Statute of Frauds, and thus excepted it from the operation of the 4th and 7th sections. He was clearly of opinion, that there was no illegality in the transaction, and (upon all the facts of the case) that the plaintiff was quite justified, both morally and legally, in marrying the second wife, although the effect of it was, that she was not his wife. The length of time during which his first wife had left him, and during which she had not been heard of, would justify her husband, and would be sufficient to justify this Court, if he had not heard of her existence, in coming to the conclusion that she had died, and in acting upon that conclusion, and, in fact, in paying money out of Court. Therefore there was no objection on that part of the case; and that being so, the plaintiff was entitled to have a decree. The only circumstance in favour of the defendant was, that the cost of the conveyance was paid by him; and this ought to be repaid by the plaintiff. As the deed was not originally void, he could not order it to be cancelled; but upon the plaintiff undertaking to repay the defendant the amount of the money paid for the conveyance, he would direct a reconveyance, at the expense of the plaintiff, and

declare that the defendant took no interest in the building society shares, and the defendant must pay the costs of the suit.

Master of the Rolls. } **SAMBLE v. WILSON.**
16 FEB. 1865.

*Practice—Equitable Mortgage—Deposit—
Foreclosure.*

The right of an equitable mortgagee by deposit without memorandum is foreclosure, not sale.

The defendant deposited with the plaintiff an indenture of lease to secure 150*l.*, but no memorandum was made of the deposit. The plaintiff, as equitable mortgagee of the premises comprised in the indenture of lease, instituted the present suit to have the lease sold under the direction of the Court, and the proceeds of such sale applied in payment of his mortgage debt and costs of suit.

Rodwell, for the plaintiff, insisted on his right to a sale. Here was no memorandum, nor anything pointing to the creation of a mortgage security; and there was a distinction between an agreement pointing to a security, and a simple deposit,

Matthews v. Goodday, 8 Jur. (N. S.) pt. 1, 90.

Charles Browne, for the defendant, submitted only to the usual decree.

THE MASTER OF THE ROLLS said, that except by consent, the proper decree was for foreclosure. The deposit was equivalent to an implied agreement for a mortgage.

Note.—See

Tuckley v. Thompson, 1 J. & H. 126;
1 Seton on Decrees, 448 (3rd ed.).

Master of the Rolls. } **CHADWICK v. TURNER.**
17, 18, 21 FEB. 1865.

*Priority—Registration Act—6 Anne, c. 35—
Will—Mortgage.*

Under the Registration Act for the East Riding of Yorkshire, a mortgage by an heir-at-law was registered. At that time, unknown to the heir-at-law, a will excluding him had been found, but was not registered until more than six months afterwards:—

Held, that the mortgagee had priority over the devisees.

In July, 1833, a freehold house, in Kingston-upon-Hull, was conveyed, by a deed duly registered, to R. Tealby Turner, in fee, upon trust for the separate use of Sarah Gooddy, her heirs and assigns. Sarah Gooddy died on the 27th of January, 1854, leaving the defendant, William Atkin, her heir-at-law. Her husband, Richard Gooddy, survived her, and died on the 10th of May, 1854.

Richard Gooddy took possession of the house, but ultimately surrendered it to the defendant, William Atkin, on certain terms.

On the death of R. Tealby Turner, intestate, in 1856, the legal estate in the house became vested in his heir-at-law, the defendant R. Thomas Turner, who was an infant.

William Atkin, on the 9th of June, 1862, mortgaged the house, with other property also derived from Sarah Gooddy, to the plaintiff, James Chadwick, upon which 1796*l.* 12*s.* 8*d.* was now due. The mortgage deed was in form a conveyance to the plaintiff upon trust for sale, and was registered on the 12th of June, 1862, at Beverley, which is, by the Act, the place of registry for Kingston-upon-Hull.

The family were surprised that Sarah Gooddy had left no will, but no will was found until September, 1863. William Atkin, and consequently the plaintiff, believed that Sarah Gooddy had died intestate; but, in that month, they were informed that a niece of Sarah Gooddy, the defendant Ann M'Kee, with whom Richard Gooddy had lived since his wife's death, had found, amongst some old papers belonging to Richard Gooddy, and left at his death in her possession, a will and codicil of Sarah Gooddy. The will was found in June or July, 1861; but was kept by Ann M'Kee without being communicated to anybody but one cousin, until the discovery of the codicil, which was first found on the 14th of September, 1863.

The will was dated the 21st of April, 1841, and devised the house to Richard Gooddy for life, with remainder to William Atkin in fee, upon trust to pay the rent of it (21*l.* a year) to the testatrix's niece, M. A. Prance, during her life, and after her death upon trust to sell the house, and divide the proceeds among the children of M. A. Prance. The codicil was dated the 7th of December, 1853, and devised the rent of the house to Ann M'Kee for her life, if she survived Richard Gooddy and M. A. Prance; but otherwise confirmed the will.

This will and codicil were registered at Beverley on the 4th of February, 1864. A second codicil, dated the 2nd of December, 1853, leaving some pecuniary legacies, was discovered by Ann M'Kee in March, 1864, after putting in her answer, and was registered on the 2nd of June, 1864. Letters of administration, with the will and codicils annexed, had been granted in common form on the 13th of October, 1864.

M. A. Prance died on the 15th of December, 1856, leaving four children, one of whom, Eliza, died in June, 1862, and the others, W. Richard Prance, Eleanor Atkin Prance, and Ann, the wife of G. Atkinson, were defendants to this suit.

The bill was filed on the 30th of November, 1863. It prayed, for a declaration that the interest of Ann M'Kee and the children of M. A. Prance, under the will and codicils of Sarah Gooddy, was subject to, and ought to be postponed to, the plaintiff's mortgage, and

for foreclosure or sale, and a receiver. The answer was filed in February, 1864, and notice of motion for a decree given on the 6th of May, 1864. The supplemental answers of Ann M'Kee and W. R. Prance, setting up the second codicil, were filed on the 28th of June, 1864. These two defendants obtained from time to time an extension of the time for filing affidavits, which were ultimately filed on the 16th of September, 1864. On the 25th of October, twelve days after administration was obtained, Ann M'Kee and W. R. Prance gave notice that they intended to use the letters of administration as evidence of the validity and contents of the will and codicils. No counter notice of intention to dispute their validity had been given. The plaintiffs filed their affidavits in reply on the 10th of December, 1864, and one of these witnesses was cross-examined on the 30th of January, 1864.

The plaintiffs, by their affidavits in reply, impeached the validity of the will and codicils. The defendants M'Kee and W. R. Prance asserted that William Atkin knew of the will and codicils at the date of the mortgage, and had given a receipt for some of the legacies given by the second codicil, and that it was pursuant to the will that the arrangement was entered into with Richard Gooddy about giving up the house.

The plaintiff, in his bill, had merely alleged that William Atkin was Sarah Gooddy's heir-at-law, and had not stated the chain of descent. The only evidence of the heirship was William Atkin's assertion of it in his answer, and certain facts which showed that he had been treated by the family as her heir-at-law.

Hobhouse, Q.C., and *E. E. Kay*, for the plaintiff.

It must be admitted that Sarah Gooddy could devise this house after the decision in,

Taylor v. Meade, 5 N. R. 348.

The evidence throws such suspicion on the will and codicils that the Court cannot accept them as valid,—at any rate without trying the question by a jury.

Under the Yorkshire Registry Act (6 Anne, c. 35, s. 1), this mortgage being first registered, has clearly a priority over the will, unless the case comes within the exceptions in the 14th and 15th sections of that Act, which it does not. Even where there is perfect *bona fides*, and both parties are equally innocent, the policy of the Act is to protect the purchaser at the expense of the devisees. Here, too, the mortgage was registered some eight and a half years after Sarah Gooddy's death, and there was then no will on the register. The case is not brought within the exception of section 15, for the will was not registered six months after its "attainment," i.e., after it was found. Keeping back the will was "wilful neglect and default," if the previous abstaining from a search for it was not so. They did not enter a memorial of an "impediment," though they say they believed there was a will. If they had done so, then the will, when found, would have related

back to the time of the death. They have not brought themselves within the 15th section, and we must, therefore, take priority. If by registration after any length of time a will has priority, no title would be safe.

The plaintiff denies the allegation that he had notice of the will, and William Atkin does the same, and mere suspicion of notice will not suffice,

High v. Dodd, 2 Atk. 275.

The Court will, at any rate, not compel us to give up the title-deeds, which are part of our security,

Hunt v. Eames, 28 Beav. 631.

E. K. Karslake, for the mortgagor William Atkin, and Ann and George Atkinson, took no part.

Cole, Q.C., and *Jace*, for Ann M'Kee and W. Richard Prance.

The plaintiff claims through the heir-at-law of Sarah Gooddy, and has not proved the heirship. As we challenged his title, a mere allegation is not a sufficient averment of it,

Baker v. Harwood, 7 Sim. 373 ;

still less is it a sufficient proof of it,

Holden v. Hearn, 1 Beav. 445 ;

Marten v. Whitchelo, Cr. & Ph. 257.

[THE MASTER OF THE ROLLS suggested that it might be proved at the hearing, under 13 & 14 Vict. c. 25 (July 1850), s. 28.]

It is not a collateral fact, and here affidavits have been filed, so that Act does not apply.

As they did not give us notice of objection to the letters of administration, they cannot now dispute the validity of the will and codicils annexed to it,

20 & 21 Vict. c. 77, ss. 63, 64.

The present case clearly comes within the purview of the 14th and 15th sections of the 6 of Anne, c. 35, and the will, if registered within six months after the mortgage deed, would have been paramount to it. In section 15, "impediment" is not the same as inevitable difficulty, so there is no limit of six months where there is an inevitable difficulty.

It is extravagant to say that any one who supposes a will exists under which he may have an interest could put on the registry a memorial of an impediment. The will not being found, there was no one who could sign and seal the memorial according to section 10. There is no obligation to register a memorial of the impediment.

In the Yorkshire Act no time was limited for registering concealed wills. In the Middlesex Act (7 Anne, c. 20), passed subsequently, a limit of five years was expressly enforced in the case of concealment of a will, showing that the Legislature considered that the absence of such a limit was a defect in the prior Act, and that "impediment" included concealment. In Yorkshire, therefore, the ordinary Statutes of Limitation apply.

The plaintiff has not on the register a conveyance to him of the legal estate, and is excluded from the

benefit of the Act, and therefore the defendant Turner is a trustee for the devisees, and bound to convey the estate to them,

Ford v. White, 16 Beav. 120.

[THE MASTER OF THE ROLLS referred to

Willoughby v. Willoughby, 1 T. R. 763.]

Hobhouse, Q. C., in reply.

The conditions precedent necessary to bring a case within the exception of the 15th section are, an inevitable difficulty, absence of wilful neglect, and registration of a memorial of the impediment within six months after the death. This last was inserted in consequence of purchasers being found to be not sufficiently protected under the West Riding Act, 2 & 3 Anne, c. 4, s. 21. Disability to register an impediment does not prevent the operation of the Act, the policy of which is to protect purchasers.

21 FEB. 1865.

THE MASTER OF THE ROLLS said, that as to the first point raised by the defendants, it was certainly not proved that William Atkin was heir-at-law of Sarah Gooddy. His swearing that he was heir-at-law, without showing the chain of descent, amounted to nothing. But there was distinct evidence that Richard, the husband of Sarah Gooddy, had acknowledged William Atkin as his wife's heir-at-law, and had put him in possession, not only of the house, but also of other property not affected by the will, and that the whole family had treated William Atkin as heir-at-law for nine years, up to the time of the registration of the will. In his Honour's opinion, this was sufficient to entitle the plaintiff to an inquiry whether William Atkin was heir-at-law or not.

It was unnecessary to go into the evidence respecting the validity of the will and codicils; but, in his Honour's opinion, independently of the fact that probate had been granted, the will was good, whatever was the case of the codicils, and the will alone was sufficient, independent of the Registration Act, to invalidate the plaintiff's mortgage.

There was distinct evidence that Richard Gooddy knew, if not of the will and first codicil, at least of the second codicil, because he had paid legacies under it. And it was contended that William Atkin knew of the will and codicils, because as agent for two of the legatees he had signed a receipt for the legacies. But the existence of the will was not necessarily to be inferred from the reference to it in the codicil, for the testatrix might have destroyed it after the execution of the codicil. Moreover, it is not shown that he ever saw the codicil, or knew anything about it, beyond signing the receipt for the legacies, while he had been put in possession of the house as heir by the very person who had possession of the codicil, and had paid the legacies. In his Honour's opinion, William Atkin had not only no express, but no constructive, notice of the will and codicils.

The real substantial question was, whether the provisions of the statute for the Registration of Deeds and Wills in the East Riding of York rendered this mortgage valid, or whether, notwithstanding, the will deprived the plaintiff of all interest in the property. In his Honour's opinion, the statute was imperative on the subject, and the mortgage must have priority. By the 1st section it was expressly declared that the mortgage should be valid and the will invalid, unless registered in the manner thereafter directed. This manner is specified in the 10th and 11th sections, and part of it consists in the registration of the will within six months after the testator's death. This condition has not been complied with, and if the Act stopped there, this will would clearly be void against the plaintiff. The only question, therefore, was, whether the case came within the 15th section. Now, assuming that in the present instance there was an "inevitable difficulty" or "impediment," the exception, as the clause specifies, only takes effect if a memorial of the impediment is entered at the Registry-office within six months after the testator's death. That had not been done in the present case, and it had been argued that it could not be done. But the Act provided that the will should prevail against the mortgage only in those cases where such a memorial is registered, and that in other cases, whether it was, or was not, possible to register a memorial, the will should be void against a previously registered mortgage. In the present case, however, such a memorial could have been exhibited. Richard Gooddy could have done it; and in July, 1861, Ann M'Kee could have done it: and if the will had been registered by Ann M'Kee within six months after it was found by her, it would have been in sufficient time to prevent the execution of the plaintiff's mortgage-deed, which was not executed until one year after the will was found. The mortgagee must have priority over the devisees, and must add his costs to his mortgage.

Kindersley, V.-C. } EVANS v. WILLIAMS.
16, 17 FEB. 1865.

Judgment-Creditor—Priority—Re-Registration
—23 & 24 Vict. c. 38, s. 4.

The 23 & 24 Vict. c. 38, s. 4, is not retrospective.

A judgment was registered in 1840, but not re-registered in 1845 according to the provisions of the 2 & 3 Vict. c. 11. Before the passing of the 23 & 24 Vict. c. 38, the debtor died, so that the judgment could not be re-registered within five years before his death according to the saving in section 4 of the latter statute:—

Held, that the judgment-creditor had priority in the administration of the debtor's assets.

The plaintiffs were the personal representatives of John Evans. Previously to the year 1839, Isaac

Williams executed a bond in favour of John Evans. In 1839, an action was brought on the bond; and in 1840, verdict was given for 2008*l.* 4*s.*, and judgment for that amount registered on the 13th of May in that year. This judgment was not re-registered in 1845. In 1846, the debtor, Isaac Williams, died; and in June, 1847, administration with the will annexed was granted to his heir-at-law, Matthew Williams, who continued to make payments to the plaintiffs on account of the above debt. In 1861, Matthew Williams died; the defendant, George Williams, was his executor, and was at the time of the present suit the personal representative of the debtor Isaac Williams. In June, 1862, the plaintiffs filed their bill, praying that an account might be taken of what was due to them on the above security, as the legal personal representatives of John Evans. On the 22nd of July, 1863, the ordinary administration decree was made, and an account was directed of what was due to the plaintiffs on the security of the judgment above mentioned. In Chambers the defendants raised the question, as to what was the order in which this debt should be paid; and the case was adjourned into Court on this point.

Baily, Q.C., and *E. K. Karlake*, for the plaintiffs.

In 1840, we had a lien on our debtor's land, and a right of priority in the administration of his assets over all other debts that occur in the present instance. After the time for re-registration in 1845 had passed, we were no doubt postponed to persons who afterwards obtained a lien on the land, but we retained our priority to all other parties. It is settled that the omission of re-registration makes no difference, except as to persons who subsequently attain a lien on the land,

Shaw v. Neale, 6 H. of L. Ca. 581;

Beavan v. Lord Oxford, 6 De G. M. & G. 492;

Simpson v. Morley, 2 K. & J. 71.

This last case was on the provisions of 2 & 3 Vict. c. 11, s. 41, and decided that creditors, as such, have no right against their debtor's lands within the meaning of this Act; so

Benham v. Keane, 1 J. & H. 685.

We had then, at the death of our debtor, a priority over all persons who had not gained priority in the interval; there were none. Such were our rights when the 23 & 24 Vict. c. 38, was passed. It is a rule that statutes are not to be construed retrospectively,

Dwarris on Statutes, 540;

Moon v. Durdin, 2 Exch. Rep. 22;

Wright v. Hale, 6 H. & N. 227;

Attorney-General v. Sillim, 10 H. of L. Ca. 763.

The

4 & 5 Will. & Mary, c. 20, gave priority to registered judgments, and took away that of all others. By the 2 & 3 Vict. c. 11, which

put an end to docketing, the 4 & 5 Will. & Mary, c. 20, was repealed, and the old law revived,

Fuller v. Redman, 26 Beav. 600.

The 23 & 24 Vict. c. 38, was then passed with the object of placing matters *in statu quo*.

The language of section 4 of that Act is prospective. In the present case the testator was dead when the Act was passed; and there was no possibility of our bringing ourselves within the protection afforded by this section.

Glassey, Q.C., and *Roxburgh*, for the defendants.

It was held in,

Thompson v. Walthman, 3 Drew. 628,

that the 19 & 20 Vict. c. 97, s. 14, was retrospective; and though this particular section cannot be now held to be retrospective, there is no doubt that the rule of construction relied on by the other side must yield to the intention of the Legislature. The 23 & 24 Vict. c. 38, s. 4, was passed to remedy the evil instanced by *Fuller v. Redman*, and it is plainly retrospective in its terms.

The plaintiffs have no preference over simple contract creditors in administration—they are expressly within the words of this section.

Millar, for a creditor in the same interest as the defendant, quoted,

Re Turner, 33 L. J. Ch. 232,

where Wood, V.-C., held that an unregistered judgment has no priority over simple contract creditors.

Baily, Q.C., in reply.

KINDERSLEY, V.-C., said, that he was in favour of the plaintiff's contention. By virtue of different statutes, judgments had a twofold effect. First, they were a lien on the debtor's land against purchasers and mortgagees; secondly, they gave a priority in the administration of his assets to judgment creditors over creditors of a different degree. Provided that the judgment was docketed in accordance with the provisions of 4 & 5 Will. & Mary, c. 20, it retained this priority for twenty years, and could then be revived by a *scire facias*. By the 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, docketing was done away with, and a fresh machinery was introduced. The effect was to take away from unregistered judgments their operation in affecting land, but did not take away their priority in the administration of assets. The 23 & 24 Vict. c. 38, took away from unregistered judgments their priority in the administration of assets, as the 4 & 5 Will. & Mary, c. 20, had done from undocketed judgments, but it did not treat the omission in the former Acts as a slip. This is shown by the language of section 3. The words "shall not have elapsed" in section 4, are more properly appropriate to deaths to take place after the passing of the Act. But this was minute criticism. The principal ground for his decision was the broad ground that, unless the Court saw a clear intention of the Legislature to deprive a man of a right

existing at the time when an Act was passed by *ex post facto* legislation, it would not imply such an intention. He saw nothing in this Act to lead him to such a construction; and he considered that the right acquired by the creditor continued, notwithstanding the passing of the Act.

Stuart, V.-C. } **PIFFARD v. VANRENEN.**
16 FEB. 1865. } **VANRENEN v. PIFFARD.**

Practice—Administration Suit—Administration Summons.

Where a suit commenced by bill was instituted by an executor for administration, and the bill alleged wilful default, and sought consequent relief, and the executor subsequently commenced a second suit by an administration summons:—

Held, that the Court would order the ordinary administration accounts to be taken, without waiting until the suit commenced by bill could be brought to a hearing.

This was a motion to discharge an order obtained on summons in Chambers by Vanrenen, as executor of Elizabeth Piffard, against his co-executor C. Piffard, for the administration of their testatrix's personal estate.

The summons was taken out on the 16th of January last. But on the 11th of January, C. Piffard had filed a bill for administration of the same estate against Vanrenen and others, asking for special inquiries in addition to the usual administration accounts, charging Vanrenen with misconduct, and praying for an injunction and receiver against him. The usual administration order was nevertheless made on the summons.

Malins, Q.C., and *Cust*, for C. Piffard, now moved to discharge the order. They cited,
Rump v. Grunhill, 20 Beav. 512.

Bacon, Q.C., and *Fooks*, for Vanrenen, were not called upon.

STUART, V.-C., said: He saw no reason why the two suits should not be allowed to proceed side by side. It would be convenient that the ordinary administration accounts should be taken, without waiting until the suit commenced by bill could be brought to a hearing. He, therefore, refused the motion.

Stuart, V.-C. } **MAKEPEACE v. ROGERS.**
21 FEB. 1865. }

Account—Landowner and Agent—Fiduciary Relation.

Demurrer to a bill by a landowner against his agent and manager, who refused to furnish proper accounts, overruled.

The bill was filed by a landowner against his agent, for an account.

The bill stated that the defendant had been agent and manager of the plaintiff's estates, and had been left almost uncontrolled in the management, and had also had the entire conduct of certain sales of timber and portions of the estates. The bill admitted that the defendant had furnished accounts; but alleged that these were meagre and unsatisfactory, and that the defendant had not produced the vouchers, or given full or sufficient explanations.

The prayer of the bill was for an account of all moneys received or paid by the defendant on behalf of the plaintiff.

The defendant demurred, for want of equity.

Malins, Q.C., and *Boyle*, in support of the demurrer.

A bill for an account will not lie, unless the account is mutual. Here the receipts and payments are by the defendant only,

Phillips v. Phillips, 9 Hare, 471.

The cases of

Mackenzie v. Johnston, 4 Madd. 373; and

Shepard v. Brown, 4 Giff. 208;

are virtually overruled by,

Smith v. Leveaux, 2 N. R. 267; 1 H. & M. 122; s. c. on Appeal, 3 N. R. 18,

where Vice-Chancellor Wood's judgment, overruling the demurrer, was reversed on appeal.

Smith v. Leveaux was followed in,

Flockton v. Peake, 3 N. R. 453, 626.

The ground of the Court's interference is the trust between the parties,

Padwick v. Stanley, 9 Hare, 627;

but such a relation has not been shown here.

The mere relation of principal and agent is not enough,

King v. Rossett, 2 Y. & J. 33.

The plaintiff's remedy is an action at law for moneys had and received.

Even if a landowner is generally entitled to come to this Court for an account, the bill here shows no case. It admits that accounts have been rendered, and it does not allege any omission, error, or misrepresentation. It is simply a bill for the production of vouchers. The object might be attained by summons under the Common Law Procedure Act.

Osborne, Q.C., and *F. Kelly*, for the plaintiff, were not called on.

STUART, V.-C., said: This was a bill by a landowner against his agent, alleging that proper accounts had not been given. Wherever there was a fiduciary relation, such, for instance, as imposed the duty of keeping accounts and producing vouchers, the principal was entitled to an account. The cases of *Lord Hardwicke v. Vernon* (14 Ves. 504, 510), *Lord Salisbury v. Ceci* (1 Cox, 277), and *Lord Chedworth v.*

Edwards (8 Ves. 46), showed that the relation of landowner and agent was one of so fiduciary a nature, as almost to create a trust. In the case of *Hemings v. Pugh* (4 Giff. 456), he (the Vice-Chancellor) had allowed the demurrer, though with great regret, because there was no fiduciary relation. So in *Flockton v. Peake* (*loc. cit.*), where the bill was filed against a builder by his employer. He thought that in *King v. Rossett* (*loc. cit.*), Chief Baron Alexander had laid down a very strong proposition. The old practice of sending a suitor elsewhere, was not consistent with modern legislation. The recent Acts of Parliament should be construed liberally, and the Court should not extrude a suitor if it had power to settle the case.

The demurrer must be overruled with costs.

Wood, V.-C. }
24, 25, 27, 30 JAN. } *ONIONS v. COHEN.*
13 FEB. 1865.

*Agreement for Lease—Specific Performance—
Cancellation—Absolute Covenant.*

Except in cases of fraud, the Court will not, at the suit of a purchaser, order an agreement to be delivered up to be cancelled.

Gwillim v. Stone, 14 Ves. 128, remarked on.

Where a person has laid out money on the faith of an agreement to grant a lease of lands and furnaces, the lease to contain onerous covenants on the part of the lessee, and a covenant on the part of the lessor for quiet enjoyment, a lease in accordance with the agreement was ordered to be executed, although the lessor had only a title to the surface lands.

By articles of agreement in writing, duly signed and dated the 21st of July, 1861, Joseph C. Cohen, the defendant, agreed to grant, and James and George Onions, the plaintiffs, agreed to take, a lease by indenture of a piece of land, therein described, situate at Westbromwich, in the county of Stafford, and the two furnaces, &c., standing thereon, and then in their occupation, for the term of seven years from the 24th of June, 1861, subject to a power of determining the lease in case the defendant should sell the property within twelve months; the lease to contain on the part of the Messrs. Onions, a covenant to pay rent as therein mentioned, and to keep the furnaces, winding-engine, heating-oven, weighing house, and other premises intended to be demised, in as good and proper working order and repair as the same then were, and to leave and deliver up the same furnaces, &c., together with all the parts and fittings thereof, together with the peaceable possession thereof, at the expiration of the term, with a proviso for determining the lease in case of bankruptcy or insolvency.

The articles continued, that it was agreed that Cohen should covenant that, subject to the payment of the rent and performance of the covenants by

the Messrs. Onions, they, their executors, administrators, and assigns, should peaceably and quietly hold and enjoy the premises for the term thereby demised.

The Messrs. Onions were at the time of making this agreement in possession of the whole of the premises as tenants of Cohen, and had been in possession of part of the same premises since August, 1859, as tenants to one Richards, who was the original lessee, for a term of twenty-one years from 1854, of all the premises included in the above agreement from the Birmingham Canal Company under the powers of their Act, 5 Geo. 4, c. 35, and who had assigned all his interest in the lease to Cohen. Under the agreement the Messrs. Onions had laid out money in the repair of the furnaces and machinery.

The premises were not sold by Cohen within the year, and the Messrs. Onions claimed a lease of the premises according to the terms of the agreement. During the year one of the blast furnaces became damaged, according to the Messrs. Onions, through subsidence of the ground,—owing to mining operations being carried on underneath, and there was cause to fear further damage, if the mines continued to be worked. On this point there was a conflict of evidence. On the draft lease being sent to the solicitors of the Messrs. Onions, they insisted on a clause being inserted to indemnify their clients against any injury to their works from a continuance of the mining operations, they being liable, if the lease were not altered, to keep the premises in repair, and a long correspondence ensued, which led eventually to the solicitors of the Messrs. Onions demanding an abstract of the lessor's title. Cohen's solicitor, without recognising any right in the Messrs. Onions to investigate the title, sent them an abstract commencing with the lease in 1854 from the Birmingham Canal Company to Richards.

The Messrs. Onions objected to this, as showing no title in Cohen to the mines underneath the surface, and asked for further information; which Cohen refusing, or being unable to produce, the bill in this suit was filed.

The prayer of the bill, after asking a specific performance by the defendant of his part of the agreement, the plaintiffs thereby offering to perform their part of the same, and declaring that they were entitled to have a title shown to the mines, continued as follows—

And if, by reason of defect of title or otherwise, the defendant shall be unable specifically to perform the same agreement, then that the said agreement may be set aside and cancelled, without prejudice to any action which the plaintiffs may be able to sustain at Law against the defendants for the recovery of damages from him for the loss and injury sustained by them by reason of his inability specifically to perform the said agreement."

The defendant, it was now agreed, could not make any title to the mines, and a good deal of conflicting

evidence was gone into, the defendant contending that the plaintiffs, if they were not, ought to have been fully aware of this fact from the nature of the lease under the Canal Company's Act, and from the general tenure of property in a neighbourhood, where the mines and surface were in many cases held by distinct owners. At all events, the plaintiffs were aware of it when they filed their bill. The plaintiffs, on the other hand, asserted that they had no means of knowing that Cohen was not the owner of the mines, and that they were not actually certain of it until quite recently, and then only from an affidavit made in the cause by Cohen's solicitor.

Giffard, Q.C., and *Fischer*, for the plaintiffs, argued, that it was clear from the evidence, that the plaintiffs were not aware, when they entered into the agreement, that Cohen had no title to the mines. By the agreement, they were to enter into onerous covenants, and were entitled to an absolute covenant for quiet enjoyment. The form of the prayer was similar to the relief granted by Sir W. Grant in

Gwillim v. Stone, 14 Ves. 128.

There had been an offer by the plaintiffs to abandon the contract. The plaintiffs were in possession of the premises at the time of the agreement, so that there was no inference from that circumstance of any waiver of right to investigate the lessor's title,

Simpson v. Sadd, 4 De G. M. & G. 665.

The defendant cannot prevent the mines from being worked, and occasioning injury to the plaintiffs.

Sir H. Cairns, Q.C., and *W. Morris*, for the defendant, commented on the unusual nature of the relief prayed by the bill. It was clear that, if a plaintiff came into that Court and said, "You can't give me a good title, and I won't take a bad one," the Court would dismiss his bill with costs; but if he came to the Court for aid to determine whether a title could be given or not, then some alternative relief, as in the case of *Gwillim v. Stone*, might be granted. This was clear from *Gwillim v. Stone*. The case was not argued for the defendant in that case, who did not appear. The report says, "The Master's report, under a reference, as to the title of the defendant, was against his title"—so there must have been a reference. In this case, the moment attention was drawn to the mines being in third parties, it was evident a title could not be made. The plaintiffs must have been aware that the defendant had no title to the mines. It was not prayed that the contract might be delivered up, but that it might be cancelled.

King v. King, 1 Myl. & K. 442,

which was a suit by a vendor, shows that a vendor has a right to know whether a purchaser will take such a title as he can give. This was not a mere contract *in fieri* on two bits of paper, but the plaintiffs were defendant's tenants, and there were rights on both

sides regulated by the agreement. From the circumstances of this case, there had been a waiver of any right to investigate the lessor's title. It was usual to ask for an abstract of title first, and not when the terms of a draft lease are objected to, then to call for an abstract.

They cited also,

Hilton v. Barrow, 1 Ves. jun. 284.

The plaintiffs had not offered to abandon the contract; what they had offered to do was to abandon with compensation.

Giffard, Q.C., in reply, contended that it was necessary that the agreement should be delivered up, as there was nothing illegal on the face of it, and the plaintiffs would have no answer to an action at law upon this agreement,

Simpson v. Lord Howden, 3 Myl. & Cr. 97, 107.

As to an absolute covenant for quiet enjoyment,

Woodfall L. & T. 543.

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WOOD, V.-C., said, that as regarded the form of the prayer, in the event of specific performance not being decreed, he thought the contest of the defendant was correct. Although there was the case of *Gwillim v. Stone* (*loc. cit.*), yet it did not appear to have been followed, nor could he conceive how in principle such a decree could be made. Being a decision of Sir W. Grant, it would be entitled to great weight; but it was not decided upon argument, as the defendant did not appear, and the only point discussed was a doubt of the plaintiff's counsel whether he could have, according to *Denton v. Stuart* (1 Ves. jun. 329), and *Greenaway v. Adams* (12 Ves. 129)—two authorities which the same learned Judge refused subsequently to follow in *Blore v. Sutton* (3 Mer. 237)—a reference to the Master, with a view to ascertain the injury he suffered by the non-performance of the contract. It was now clear that there could be no inquiry as to damages for the mere non-performance of a contract. His Honour, after commenting on *Malden v. Fyten* (9 Beav. 347; 11 Q. B. (N. S.) 292), and referring to the case of *Wood v. Scarth* (2 K. & J. 44), before himself, in which he had added to the decree the words, "and the costs of this suit being included in such action," to meet the difficulty raised at Law in the former case, said, that with the exception of *Gwillim v. Stone* (*loc. cit.*), no case had been found, and as his Honour thought, could be found, in which the Court had, upon a purchaser's application, directed the contract to be delivered up in the absence of fraud, merely upon the ground that a good title could not be made. Upon that branch of the bill, the plaintiffs were not entitled to relief. His Honour was proceeding to decide whether the plaintiffs were or were not entitled to a lease with an absolute covenant for quiet enjoyment, when *Sir H. Cairns*, intimating that he had understood, that that part of the case had been given up at the bar, this point was left for further argument.

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Sir H. Cairns, Q.C., and Morris.

The agreement is for a demise of the surface, but assuming that it was to demise the whole land, the Court would never compel us to give a covenant for quiet enjoyment to that part to which we have no title. That would enable the plaintiffs to bring an action of covenant against us instead of a mere action on the contract.

[WOOD, V.-C.—Is it not a case where a person has laid out his money on the faith of having a lease in this particular form?]

No, it is only a common agreement for a lease. The covenants must be construed with reference to the property to be demised.

Giffard, Q.C., and Fischer, contra.

The plaintiffs enter into an agreement without seeing the defendant's title, and on the faith of that agreement expend money. The agreement says distinctly, the defendant will grant, and the plaintiffs take a lease of "all that, &c." A proper lease, therefore, must be granted,

*Pain v. Coombs, 1 De G. & J. 34 ;**Mundy v. Jolliffe, 5 My. & Cr. 167.*

Where there is a contract to do a particular thing, this Court will take it to have been done, so as to place the parties in the same position as if it had been done. There is a great difference between the case of a lease to be granted, and a sale.

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WOOD, V.-C., said that in ordinary cases the Court would not order a conveyance to be executed where a title could not be made to the whole of the land conveyed. This was not an agreement for a sale, it was a simple agreement for a lease by indenture for seven years, containing certain covenants, and there might be specific performance in a proper manner. There were cases to that effect. His Honour referred to Fry on Specific Performance, p. 241, and the distinction there drawn between *Granville v. Betts* (1 L. J. Ch. 32), and *Wythes v. South Wales Company* (5 De G. M. & G. 880). The substance of the agreement here was a lease for seven years. That lease might go on to the end of the term, independently of any damage that might be sustained, which the defendant would be bound to make good. A lease must be given containing the various stipulations expressly provided by the agreement.

COMMON LAW.

Q. B. }
3 FEB. 1865. } KENYON v. HART.

Day-poaching—Trespass in Pursuit of Game—
1 & 2 Will 4, c. 32, s. 30.

To constitute a trespass in pursuit of game, under section 30 of 1 & 2 Will. 4, c. 32, it must be a trespass in pursuit of live game.

A, on his own land, shot at a bird in B's land, but which had risen in A's land: the bird fell dead on B's land, and A went on B's land, and picked it up:—

Held, that the Justices were right in not convicting of a trespass in pursuit of game.

Case stated by Justices under 20 & 21 Vict. c. 43.

At a petty sessions at Ashford, Kent, on the 5th of November, the respondent, Stephen Hart, of Westwell, in the said county, appeared on an information by the appellant, James Kenyon, of Westwell, under-gamekeeper, charging him, the said respondent, for that he did, on the 1st of October, 1864, at Westwell aforesaid, unlawfully commit a trespass by being in the daytime of the same day upon certain land, in the possession and occupation of Henry Tappenden, there in search of game without the licence or consent of the

owner of the land so trespassed upon, or of any other person having the right to authorise the said Stephen Hart to enter in or upon the said land for the purpose aforesaid, contrary to the statute, &c., whereby the said Stephen Hart had forfeited a sum not exceeding 20*l*.

On the hearing of the case the appellant, on oath, stated, "I am under-keeper to Sir Richard Tufton Bart. On the 1st of October last, about half-past ten a.m., Mr. Hart, the respondent, was out shooting. He shot a cock pheasant, and it fell on Mr. Tappenden's field, belonging to Sir Richard Tufton. He went and fetched the bird himself, taking his dog and gun with him. Mr. Hart was on his own land when he shot the pheasant, and it rose off Mr. Hart's land. The pheasant was dead when Mr. Hart picked it up and it laid on its back."

When the respondent's counsel was addressing the Court, the Chairman re-called the appellant, and asked him whether, when the respondent shot the pheasant, it was or was not in the air over the land belonging to Sir R. Tufton? The appellant replied, it was over Sir R. Tufton's land, and fell a considerable distance within Sir R. Tufton's boundary.

The respondent's solicitor objected to the question

being put after the appellant had heard the opening of the respondent's case.

The respondent's attorney contended,—First. That on the appellant's evidence no trespass had been committed within 1 & 2 Will. 4, c. 32, s. 30, as the pheasant rose off the respondent's land, and the respondent was on his own land when he shot the bird. Secondly. That section 30 of that Act did not apply to dead game.

The Justices dismissed the case, on the grounds that, as the pheasant was raised off the respondent's land and shot by him (the respondent), when he (the respondent) was on his own land, the mere act of entering the land, stated in the information, for the purpose of picking up the pheasant, which was then dead, as proved by the evidence, was not such a trespass in pursuit of game contemplated by 1 & 2 Will. 4, c. 32.

The question for the opinion of the Court was, whether the Justices were right, in point of law, in dismissing the case on the grounds above stated.

Section 30 is as follows:—"And whereas, after the commencement of this Act, game will become an article which may be legally bought and sold; and it is, therefore, just and reasonable to provide some more summary means than now by law exists for protecting the same from trespasses: be it, therefore, enacted, That if any person whatsoever shall commit any trespass by entering or being in the daytime upon any land in search or pursuit of game or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a Justice of the Peace, forfeit and pay such sum of money, not exceeding two pounds, as to the Justice shall seem meet, together with the costs of the conviction."

Keane, Q. C., for the appellant, cited—

Osmond v. Meadows, 31 L. J. M. C. 238;

Morden v. Porter, 29 L. J. M. C. 213;

Regina v. Marsh, 2 B. & C. 717.

Denman, Q. C., for the respondent.

BLACKBURN, J.—I am of opinion that the Justices were right, and that the effect of section 30 of the Act is, to show that it was intended to prohibit entry in pursuit of live game. In many of the other sections dead game might be contemplated, as regards dealers or poulterers; but here the provision is clearly intended to apply to live game, and a trespass in pursuit of game must be a trespass in pursuit of live game. It certainly was a civil trespass: he entered to pick up the pheasant then dead, and was clearly in search of the pheasant then dead. Then the other facts show that the bird was shot in the air; the fact of its being shot in the air does not make the case differ from the case of four-footed game. In the case of *Regina v. Pratt* (24 L. J. M. C. 133), it was held that, to constitute the offence of trespassing in search of or pursuit of game under section 30, there must be a bodily entering or being on the land on which the trespass is com-

mitted; and in this case the man did enter the land after shooting the bird. Then comes *Osmond v. Meadows* (*loc. cit.*), which was cited as in point to support a conviction; but in that case the facts are different. In that case it was held that there might have been a conviction, if the magistrates had been of opinion that the shooting and picking up were one transaction, and that it was a pursuit of game, the act being consummated by the picking up of the bird: here, there is evidence that when he shot and hit the bird, it had not crossed his own boundary, and he may never have had the intention of crossing the boundary to pick it up; and we are concluded by this, and think that he might go on and pick up the bird, and that this was not a trespass in pursuit of game within the section.

MELLOR, J.—I am of the same opinion, and I think this case is not within the section, that "in search of" is "in search of live" game, i.e., visible and following it. If this case were on all fours with *Osmond v. Meadows* (*loc. cit.*), I should have required time to consider before I dissented from that case; but I do not think the decision in that case affects us, and I must clearly express my opinion that section 30 applies to live and not to dead game, and that the Justices were right in not convicting.

Judgment for the respondent.

CROMPTON, J., had left the Court.

Q. B.

8 Nov. 1864, 19 FEB. 1865. } WILSON v. RANKIN.

Marine Policy—Principal and Agent—Illegal Act of Master—Loading on Deck—16 & 17 Vict. c. 107, s. 170.

The master of a ship sailed with part of his cargo loaded on deck. This was unknown to the owner at the time the policy was effected, and was contrary to section 170 of the 16 & 17 Vict. c. 107:—

Held, the owner was not prevented from recovering on the policy by the illegal act of the master, for the master was only the agent of his owner for lawful purposes.

Declaration on valued policy on freight only:

4th plea.—That the said policy, &c., was made, and the cargo, the freight in respect of which was insured, as in the declaration alleged, was shipped on board the said ship after the passing and coming into operation of a certain Act of Parliament holden in 16 & 17 Vict., and intituled "An Act to amend and consolidate the laws relating to the customs of the United Kingdom and of the Isle of Man, and certain laws relating to trade and navigation, and the British possessions," and that the aforesaid cargo consisted of timber and wood goods, and that Restigouche in the said policy mentioned, was and is a British port in North America; and that the said ship, with the said cargo, cleared

out and sailed from Restigouch aforesaid, on the 1st of September, 1861, and before the 1st of May, 1862, to wit on the 13th of November, 1861; and that before and at the time of the said ship so sailing as herein-before-mentioned, the whole of the said cargo was not below deck, but on the contrary thereof, the master of the said ship, before and after the time of the said ship so sailing as aforesaid, placed, and permitted, and caused to be placed, and to remain, and be upon and above the deck of the said ship, part of the said cargo contrary to statute, &c.; and that at the time of the said ship so sailing as aforesaid, the master of the said ship had not obtained from the clearing officer any certificate that the whole of the cargo of the said ship was below deck, contrary to the statute in that behalf, &c.; and that before and at the time of the said ship so sailing as aforesaid, and until and at the time of the alleged loss, the plaintiff was the owner of the said ship, and the said freight so insured as aforesaid, was payable to him as such owner in respect of the said cargo.

The 5th plea was the same, except that it alleged further that at the time of the defendant subscribing the policy it was known by the plaintiff that a considerable part of the cargo was then loaded, and that a considerable part of the said cargo was intended to be loaded upon and above deck of the said ship, and that at the time of the defendant so subscribing the said policy it was intended by the plaintiff that the said ship should sail on the voyage in the declaration mentioned, after the 1st of September, 1861, and before the 1st of May, 1862, with part of the cargo stowed and loaded as in the 4th plea mentioned; and that the plaintiff effected the said policy of assurance for the express purpose of insuring and covering the freight of the said cargo, including the portion thereof so stowed and loaded above and upon the deck of the said ship as aforesaid.

Demurrer to both pleas. Plaintiff's points:

The 4th plea shows no privity in the plaintiff to the deck loading or to the master's sailing without obtaining a certificate from the clearing office.

5th plea, bad, as not showing that plaintiff was a party to or had the means of preventing the loading.

That 4th plea shows nothing, and that there is no law to deprive plaintiff of his right to insurance on the ground of want of certificate from Customs office.

4th. Insufficient, as it does not show plaintiff knew of, or authorised the matters stated, and they may have been in direct opposition to his orders and the duty of the master, and the acts of barratry on his part.

5th. Bad, for same reasons, and the additional matter alleged does not alter the effect, as it is not stated that there was any concealment.

16 & 17 Vict. c. 107, s. 170. "Before any clearing officer permits any ship wholly or in part laden with timber or wood goods to clear out from any British port in North America, or in the settlement of Hon-

duras for any port in the United Kingdom, at any time after the first day of September, or before the first day of May in any year, he shall ascertain that the whole of the cargo of such ship is below deck, and shall give the master of such ship a certificate to that effect; and no master of any ship so laden, shall sail from any of the ports aforesaid for any port of the United Kingdom, at any such time as aforesaid, until he has obtained such certificate from the clearing office."

Section 171. "No master of any ship in respect of which such certificate as aforesaid has been obtained, shall place or permit or cause to be placed, or remain upon or above the deck of such ship, any part of the cargo thereof, until such ship has arrived at the port of her destination: Provided always, that if the master of any such ship consider that it is necessary in consequence of the springing a leak, or of other damage received or apprehended during the voyage, to remove any portion of the cargo upon deck, he may remove or cause to be removed upon the deck of such ship, so much of the cargo, and may permit the same to remain there for such time as he considers expedient: Provided also, that the stores, spars, or other articles necessary for the ship's use, shall not be taken to be the cargo for the purposes of this Act."

Section 172. "If any master of any ship for which such certificate as aforesaid is required, sails or attempts to sail without having obtained such certificate, or places or permits or causes to be placed, or to remain or be upon or above the deck of such ship, any part of the cargo thereof, except in the cases in which the same is not hereby forbidden, he shall for every offence forfeit and pay any sum not exceeding one hundred pounds."

The jury found that the whole of the cargo of freight was loaded below deck, but that the master loaded above deck a quantity of spars and other articles for the use of the owner: that these spars were more than were required for the ship's use on the voyage, but did not render the ship unseaworthy; and that the owner was not, at the time of effecting the policy, aware of the master's conduct, and had given the master no instructions to act in this manner. The Judge (Shee, J.) ruled that the spars, &c., were cargo within the meaning of the Act, and directed a verdict to be entered for the defendant on both pleas, giving the plaintiff leave to move to enter the verdict for him.

A rule nisi was obtained, and now came on for argument with the demurrers.

Mellish, Q.C. (James, Q.C., and Cohen, with him) for the defendants,

Cunard v. Hyde, El. B. & E. 670;

Cunard v. Hyde, 2 El. & El. 1;

Law v. Hollingworth, 7 T. R. 160;

Bird v. Appleton, 8 T. R. 562;

Farmer v. Legg, 7 T. R. 136;

Bell v. Carstairs, 14 East, 374.

Brett, Q. C. (Milward, with him), for the plaintiffs.
 1 Arnould on Insurance, 745 ;
 1 Phillips on Insurance, ss. 214, 221, 717 ;
Metcalfe v. Parry, 4 Camp. 123 ;
Carstairs v. Allnutt, 3 Camp. 497 ;
Havelock v. Hancill, 3 T. R. 277.

Mellish, Q. C., in reply.

Cur. adv. vult.

19 JAN. 1865.

COCKBURN, C.J., now delivered the judgment of the Court. This was an action on a valued policy on freight from Restigouch to Liverpool for a total loss by perils of the sea. The 4th plea is to the effect that the ship cleared out and sailed from Restigouch, a British port in N. America, after the 1st of September, 1861, and before the 1st of May, 1862, that her cargo consisted of timber and wood goods, and that the whole of the cargo was not below deck ; but, on the contrary, that the master, contrary to the statute 16 & 17 Vict. c. 107, ss. 170, 171, 172, placed, and kept a portion of the cargo on deck, and sailed without the certificate required by the statute, and that the plaintiff was the owner of the vessel. The 5th plea adds the additional averment that the plaintiff intended the vessel to sail so loaded, and made the policy for the express purpose of protecting the adventure so prohibited by the statute in question. Both these pleas were traversed, and also demurred to.

On the trial before Shee, J., at Liverpool, it appeared that the vessel did, in fact, sail on the 13th of November, 1861, with the whole of the cargo that was on freight properly stowed below deck ; but the master took on board a quantity of spars and other articles, for his owner to be carried to Liverpool, which were placed on deck. This he did in the exercise of his general authority as master, without any instructions from the plaintiff (his owner), his object, it would appear, being, to save expense to his owner, in obtaining the materials necessary for refitting the vessel in Liverpool after the voyage.

The jury found that the vessel was not in fact rendered unseaworthy by this deck-load ; that the spars and other articles on deck were more than were required for the ship's use on the voyage, and that the plaintiff was not aware of the conduct of the master till after the policy was made and the ship had sailed. The learned Judge ruled on the construction of the proviso in the 171st section of 16 & 17 Vict. c. 107, that the spars, &c., in excess of what were required for the voyage, were cargo within the meaning of the enactment, and he directed the verdict to be entered for the defendant on both pleas, giving the plaintiff leave to move to enter the verdict for him. A rule was accordingly obtained, which came on for argument along with the demurrers. On the argument it was not disputed that the fifth plea was good, and that the judgment on the demurrer to

that plea must be for defendant ; but it was also not disputed that this plea was not proved, and that the verdict on it must be entered for the plaintiff. We expressed our opinion during the argument that our Brother Shee's ruling that the spars in question were cargo, was correct, and that, consequently, the fourth plea was proved in substance. It was objected that the plea was so framed as to aver that the portion of cargo loaded on deck was part of that which was carried on freight, but we expressed our opinion that this was an immaterial variance, the substance of the plea being that cargo was illegally carried on deck, and that, if necessary, an amendment in the plea might be made accordingly. The verdict, therefore, on the fourth plea must stand for the defendant ; but the real question between the parties is, whether the fourth plea is good in substance, and on this we took time to consider.

The result of our deliberation is, that in our opinion the plea is bad. While the cases of *Cunard v. Hyde* (El. B. & E. 670 ; 2 El. & El. 1), establish that where the provision of the sections in question, in respect of the stowage of timber on deck are violated, the voyage is illegal ; and a policy of insurance on such a voyage will not attach ; they equally decide that knowledge on the part of the assured, of the timber being so stowed, is necessary to avoid the policy, and that in the absence of such knowledge, the assured may recover. In the present case, the assured did not, in fact, know of timber being stored on the deck, or of any intention on the part of the master to stow it. But the insurance being on freight, it is said that, as the stowing of the cargo is immediately within the province and duty of the master, the assured, the shipowner must be considered as bound by the act of the master as his agent, and that the knowledge of the latter must in law be taken to be that of the owner. Admitting, of course, the general rule that a principal is bound by the acts and knowledge of his agent, while acting within the scope of his authority, we are of opinion, that that rule has no application to the present case : for although it is true that the stowing of the cargo is undoubtedly within the authority of the master, yet in absence of proof to the contrary, it must be taken that his authority in this, as in other respects, is by his instructions limited to that which is lawful. "The trust reposed in the captain of a vessel," says Lord Ellenborough in *Earle v. Rowcroft* (8 East, 133,) "obliges him to obey the written instructions of his owners when they give any : and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage : because, in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore, the master of a vessel who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners."

Applying this principle to the present case, it follows that no authority can be implied in the master in the discharge of his duty to do that which, with reference to being part of his duty, was a violation of the law. Again it is a well-established distinction that while a man is civilly responsible for the acts of his agent, when acting within the established limits of his authority, he will not be criminally responsible for such acts unless express authority be shown, or the authority is necessarily to be implied from the nature of his employment; as in the case of a bookseller held liable for the sale of a libellous publication. Under ordinary circumstances the authority of the agent is limited to that which is lawful. If, in seeking to carry on the purpose of his employment, he oversteps the law, he outruns his authority, and his principal will not be bound by what he does. Now, in the present case, as has been already pointed out, not only are there no circumstances from which an authority to contravene the statute can properly be implied, but, according to the authority of *Earle v. Rowcroft*, the reverse is to be presumed.

It appears to us, therefore, impossible to say that the master, in stowing the cargo on deck, contrary to the Act of Parliament, was acting by the authority of the owner, or that the latter was bound by his knowledge. This view of the case, as here applicable, becomes materially confirmed, if the case be looked at in another point of view. It seems clear, on the authority of *Earle v. Rowcroft*, that if the master of a vessel, acting within what would otherwise be the extent of his authority, contravenes some positive law, and thereby causes injury to his owners, this will be barratry in the master, notwithstanding that the purpose of the thing done was to benefit the owners. In the case referred to, the master, having instructions to make the best purchases with despatch, had gone into an enemy's port to complete his cargo, which could be more speedily and cheaply obtained there, in consequence of which the ship was seized and confiscated. This proceeding on the part of the master, though within the general scope of his authority, and though done in the interest of his owners, was held to be barratrous; and the owner on a policy, in which barratry of the master was insured against, was held entitled to recover. Within the principle of this decision—the soundness of which never has been questioned—the conduct of the master in the present case would have amounted to barratry, as being an unlawful act done in contravention of his duty, though with the intention of benefiting his owners. Had the statute attached the forfeiture of the vessel as the penalty of the offence, and the vessel been confiscated, the owner would have recovered on an insurance against loss by barratry. But to constitute barratry, there must necessarily be an absence of consent and knowledge on the part of the owner. Where an act which would otherwise be barratrous, is done with the assent and knowledge of the owners, it

ceases to be barratrous. If, therefore, the knowledge of the master could be taken to be the knowledge of the owner, an illegal, and therefore otherwise barratrous, act done by the master would not, in case of loss occasioned thereby, give the owner a right to recover. But *Earle v. Rowcroft* directly establishes that on loss occasioned by the illegal act of the master, without the authority of the owner, the latter may recover; and therefore shows that where the master does an illegal act, which, but for its illegality, would be within the scope of his ordinary authority, but which being illegal is barratrous, this will not amount, in point of law, to assent or knowledge on the part of his employer. For these reasons, it appears to us that the plaintiff in this action cannot be taken to have constructively, any more than he had actually, knowledge of the illegal act of the master, and that consequently, within the decision of *Cunard v. Hyde*, he is entitled to recover, and that our judgment, therefore, should be in his favour. I should add, that this judgment must be taken as that of my Brothers Blackburn, Mellor, and myself. My Brother Crompton, having been obliged to leave the Court before the argument was concluded, takes no part in the judgment.

Judgment for the plaintiff.

C. P.
16 Nov. 1864, } HOBBS v. HENNING.
30 JAN. 1865. }

Marine Insurance—Loss by Capture—Carriage of Contraband—Simulated Papers—Decision of Foreign Prize Court—Estoppel.

To a declaration on a policy of marine insurance on goods from London to Matamoras for a total loss, the defendant pleaded that the goods were contraband of war, and were shipped by the plaintiff "for the purpose of being sent to and imported into" a port in a State at war with the United States, and were liable to be seized by the cruisers of the United States as contraband; and that the ship was carrying goods and papers which rendered her liable to be seized by such cruisers; that the ship and goods were seized accordingly, which was the loss complained of; and that the defendant, at the time of subscribing the policy, was ignorant of the premises:—

Held, that the allegation that the goods were shipped "for the purpose of being sent to and imported into" an enemy's port did not deny the destination to a neutral port, but only introduced a mental purpose of the assured, after the termination of the voyage insured, for the ulterior disposition of the ship and cargo, and that it was consistent with the plea that the plaintiff's goods were sent from a neutral port to a neutral port in a neutral ship:

Held also, that the allegation that the ship was carrying goods and papers which rendered her liable

to seizure was immaterial, as the goods were not alleged to be the plaintiff's, and he was not shown to be responsible for the papers, or for any other goods than his own; and that, on the above construction of the plea, the allegation of the defendant's ignorance was of no avail:

Held further, that, even if the above construction of the plea were wrong, the allegation of ignorance was immaterial, as it was not shown that the defendant concealed any fact he was bound to disclose; and on the above grounds, that the plea was bad.

Simulated papers alone are not such a breach of neutrality as to work a forfeiture of the ship, but only evidence from which a cause of forfeiture may be inferred.

Although the decision of a foreign Prize Court must be received in evidence, still it may be examined to see whether the fact in proof of which it is adduced was clearly and certainly found by the Court that gave it; and it is for the Court here to ascertain what facts were so found, without inquiring into the legal validity of the grounds of the judgment:

Held also, by ERLE, C.J., and BYLES, J., that where a fact is found in the course of adjudication by a Prize Court, and the judgment would be conclusive evidence of that fact, the finding of such fact cannot be pleaded by way of estoppel.

Declaration in the usual form against an underwriter on a valued policy of insurance on goods, by "The Peterhoff," from London to Matamoras, with leave to call at any intermediate port or ports, for a total loss.

3rd plea. That the said ship, with the said goods on board thereof, did not sail on the voyage covered by the said policy, as in the declaration alleged.

7th plea. That the said goods were contraband of war, and were shipped by the plaintiff, for the purpose of being sent to and imported into a port in North America situate in a State then and now engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the said United States as contraband of war, and that the ship in the policy mentioned was, during the continuance of the risk, and at the time of the loss, carrying goods and papers which rendered her liable to be seized by such cruisers, and that the said ship and goods were seized accordingly, which is the loss complained of; of all which the defendant, before and at the time of making the said insurance and subscribing the said policy, was wholly ignorant.

8th plea. That before action brought the said ship and goods were, during hostilities between the United States of America and the Confederate States, seized by the cruisers of the said United States of America, and carried into a port of the said United States; and such proceedings were thereupon duly and according to the law of nations had, that afterwards, and before action brought, it was duly adjudged and determined

by the United States' Prize Court held at New York in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea; and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the said United States of America, and in violation of the law of nations; and that the ship's papers were simulated and false as to her real destination; and thereupon it was considered and adjudged by the said Court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly, which is the loss complained of. And the defendant says that before action brought all things had happened, and all times had elapsed, necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to plead the same as an answer to this action; and the said judgment so pronounced was absolutely final and conclusive, and is still in full force and effect, not reversed, annulled, or otherwise vacated.

Replications.—1. Taking issue on the above pleas.

2.—to the 7th plea, That the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico—to wit, to Matamoras, and not a voyage to any port in North America situate in a State then or now engaged in hostilities with the United States of America; and that the said ship and goods, while proceeding on the said voyage to the said port of Matamoras, were seized, as in the declaration alleged.

Demurrers to the 7th and 8th pleas.

Rejoinders.—1. The defendant, as to so much of the plaintiff's replication as relates to the defendant's 3rd plea, says, that the plaintiff ought not to be admitted to take issue on the 3rd plea and deny the truth thereof, because he says that before action brought the said ship and goods were, during hostilities between the United States of America and the Confederate States, seized and carried into port, as in the 8th plea mentioned; and such proceedings were thereupon had and such adjudication made as in that plea mentioned, and that before action brought all things had happened and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication to the defendant's 3rd plea; and that the said judgment was absolutely final and conclusive, and still is in full force and effect, and not reversed, annulled, or otherwise vacated.

3. And for a further rejoinder to the plaintiff's 2nd replication to the defendant's 7th plea, the defendant says, that the plaintiff ought not to be admitted to plead the said 2nd replication to the 7th plea, be-

cause he says that before action brought the said ship and goods were, during hostilities between the United States of America and the Confederate States, seized by the cruisers of the said United States, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had, that afterwards, and before action brought, it was duly adjudged and determined by an United States Prize Court held at New York in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid, laden, in whole or in part, with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intendment of public law; but, on the contrary, was destined for some other port or place, and in aid of and for the use of the enemies of the said United States, and in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination; and that it was considered and adjudged by the said Court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly. And the defendant says that before action brought all things and times had happened and elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's 2nd replication to the 7th plea; and the said judgment of the said Prize Court was and is absolutely final and conclusive, and still is in full force and effect, and not reversed, annulled, or otherwise vacated.

Dennurers to the 2nd replication and the 1st and 3rd rejoinders, and joinders in issue and in demurrer.

Temple, Q.C. (Hannen with him), in support of the demurrer.

Matamoras, the port to which these goods were insured, is on the Rio Grande, and in the neutral State of Mexico; opposite it, on the other bank of the river, lies territory of the Confederate States, now at war with the United States of America.

As to the 7th plea. A neutral may legally import contraband of war into a belligerent port that is not blockaded, the only consequence being that if the enemy of that belligerent port seize the goods in their passage thither, this country will not interfere to protect them from confiscation. But there is nothing in the act itself to invalidate a policy of insurance. It is laid down by Arnould that if the port be under blockade, that makes a difference; but even this may be doubted. It is quite clear that goods contraband of war may be taken to a neutral port, although the shippers might have a very strong suspicion that they

would afterwards find their way into the belligerent States. It cannot be doubted that Matamoras became a profitable market in consequence of the war, but that could make no difference. Owners of goods have a right to send them to that market, where they may be purchased either by the Federals or the Confederates. This plea is consistent with our sending goods to Matamoras, and others subsequently transporting them to the Confederate States; and indeed, if the plea meant to allege that they were going direct to a Confederate port, it would still be bad, as that would not invalidate the policy. The plea should set out how and in what respect carrying the goods and papers rendered the ship liable to be seized. The allegation of the defendant's ignorance of the nature or destination of the cargo is immaterial; because, for anything that appears on the plea, there was nothing which the plaintiff was bound to communicate.

As to the 8th plea. It sets out in terms the judgment of a New York Prize Court; but the sentence of a foreign Court of Admiralty is not conclusive as to the grounds of condemnation, unless the Court here can see plainly what such grounds were, and that, as set out, they were sufficient,

Dalglish v. Hodgson, 7 Bing. 495, 504;

Fisher v. Ogle, 1 Camp. 418.

We insured our goods, but the adjudication is against the ship. It states that she was laden "in whole or in part" with contraband of war, and not that any part of our goods was contraband. Consistently with that, there may have been many shippers, and our innocent goods condemned for their default. It is not stated that the ship was destined for any illegal port. Whether or no the papers were simulated could only be a question between insurer and insured. Therefore, on the face of this plea, no sufficient ground is shown for the condemnation of the goods.

Bernardi v. Motteux, 2 Doug. 575;

Pollard v. Bell, 8 T. R. 434;

Calvert v. Bovill, 7 T. R. 523;

Saloucci v. Woodmass, 3 Doug. 345;

2 Smith's L. C. 691 (5th ed.).

[ERLE, C.J.—You contend that if the foreign Court sets out the premises, and they do not support the conclusion, the Court is not bound by it.]

Yes. As to the finding that the papers were simulated, the ship carried a general cargo, and the plaintiff could not ascertain that the owner had proper papers. It may have been intended to lie-to of Matamoras, and put our goods on shore, and afterwards break the blockade; and consistently with the plea, the plaintiff may have been an innocent shipper, with bills of lading made out to consignees at Matamoras. In all the cases in which simulated papers have been held sufficient for condemnation, it will be found that it was on the ground that they afforded conclusive proof of the vessel being enemy's property. Here there is no adjudication that they were simulated with reference to the goods, and it is clear from the

whole judgment that it did not go on the ground that either the one or the other was enemy's property.

Arnould's Marine Insurance, 734 (2nd ed.);
Bell v. Carstairs, 14 East, 374;
Horney v. Lushington, 15 East, 46;
Oswell v. Vigne, 15 East, 70;
Bell v. Bromfield, 15 East, 364;
Steel v. Lacy, 3 Taunt. 285.

Lush, Q.C. (*Sir G. Honyman* with him), in support of the pleas.

As to the 7th plea. Its material allegations are admitted by the demurrer, and therefore, for the purposes of this argument, the defendants were wholly ignorant of the facts.

In one sense it may be true that a neutral can lawfully import contraband into a belligerent port that is not blockaded, for he violates no law of his own country by so doing, and a policy intended to cover that is not illegal. But it is a breach of his neutral character to supply either belligerent with contraband, and by so doing he subjects himself to the risk of having his property confiscated, whether it be contraband or not. Into a belligerent port that is not blockaded he may import everything but contraband; and therefore to import contraband into any belligerent port is in this sense illegal; and if the illegal carriage of contraband be under the fraudulent circumstances of false papers and false destination, it works a confiscation of both ship and cargo.

1 Kent's Com. 142 (original paging);
Wheaton's International Law, 727, 806 (ed. 1863).

A shipper, who knows the ship to carry contraband, exposes his underwriter to a war-risk, and by his own act puts the goods in a peril which the latter did not contemplate. Shipping contraband to a neutral port would not affect the policy; but if the shipment were with the intention of sending on into a belligerent port, that is a risk which was not contemplated. It is the purpose in the mind of the shipper which determines the character of the transaction. A contract entered into with an illegal object is void.

The Gaslight, &c., Company v. Turner, 5 Bing. N. C. 666; 6 Bing. N. C. 324;
Lightfoot v. Tenant, 1 Bos. & P. 551;
Laughton v. Hughes, 1 M. & S. 593;
Waymell v. Reed, 5 T. R. 599.

It is immaterial *quoad* this plea whether the Prize Court would be justified in condemning the goods or not. The United States cruisers would be justified in seizing the ship to try the question, and by the policy seizure is a total loss, and is stated in the plea to be the loss complained of. Whether the seizure be wrongful or not, directly it takes place there is a total loss.

As to the 8th plea.—The facts stated in the adjudication are admitted; and the papers being simulated as to destination justify the condemnation of the ship and cargo, guilty and innocent.

1 Kent's Com. (*loc. cit.*);
The Franklin, 3 Rob. 217.

The judgment of the Prize Court being *in rem* is conclusive as to all material facts which it states as the basis of adjudication. It is, therefore, conclusive as to the destination of the ship; and, consequently, she never sailed on the voyage insured.

Lothian v. Henderson, 3 Bos. & P. 517;
 2 Sm. L. Ca. 690 (5th ed.).

The finding that she was not destined for Matamoras means that she never was, so that the voyage never commenced, and the risk never attached.

Temple, Q.C., in reply.

That it is illegal to supply belligerents with contraband is only true in this sense—that the party's own country will not interfere to prevent confiscation. If we had carried contraband to an unblockaded belligerent port, we should have been liable to seizure, but still the policy would have attached, which it would not have done if the port was blockaded. As to the finding that the ship was not destined for Matamoras, there is a provision in the policy that she may stop at intermediate ports.

Cur. adv. vult.

30 JAN. 1865.

ERLE, C.J., now delivered the following judgment of the Court (*Erle, C.J., Byles and Keating, JJ.*):—

The declaration is on a policy of insurance on goods from London to Matamoras, in the usual form; and alleges a loss in the course of that voyage by a peril insured against.

The 7th plea alleges, that the goods were contraband of war, and were shipped by the plaintiff for the purpose of being sent to and imported into a port in a State engaged in hostilities with the United States, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was carrying goods and papers which rendered her liable to be seized by such cruisers; and the ship and goods were seized accordingly, which is the loss complained of; of all which defendant, at the time of subscribing the policy, was wholly ignorant.

The demurrer to this plea raises the question whether the facts alleged show a defence, and our answer is in the negative. The plea was probably intended to be a defence on the ground of the concealment by the plaintiff of material facts; but we do not find sufficient averments to establish that defence. As we read the plea, we take it to be consistent therewith that the goods of the plaintiff were sent from a neutral port to a neutral port in a neutral ship. The allegation in the declaration that the goods were sent from London to Matamoras is admitted by the plea; and although we cannot notice judicially the situation of Matamoras, so neither can the defendant rely on its proximity to the Confederate States, and the very unfavourable inference therefrom against the plaintiff. If the goods were in the course of transport

from a neutral to a neutral port, the better opinion (see the authorities collected in Ortolan's *Diplomatie de la Mer*, vol. ii. p. 181) seems to be, that war does not give to a belligerent any right to seize them on account of their quality. The allegation that the goods were shipped for the purpose of being sent to an enemy's port, is an allegation of a mental process only. We are not to assume, therefore, either that the plaintiff had made any contract, or provided any means, for the further transmission of the goods into the enemy's state, or that the shipment to Matamoras was an unreal pretence. If the goods were in a course of transmission, not to Matamoras, but to an enemy's port, the voyage would not be covered by the policy, and that defence is raised in direct terms by the 3rd plea. Here the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured after the termination of the voyage insured for the ulterior disposition of the cargo and ship. It is consistent with that purpose, as here alleged, that the plaintiff made the consignment for mercantile profit as the end to be attained by him, in other words, that he knew of an effective demand for war-like stores at Matamoras, and was induced to send a supply by the expectation of high price, and that he expected that the purchase would probably be made on behalf of the Confederate States, and in that sense had the purpose that the goods should pass into those states. In this sense, price was the ultimate end which he purposed to attain, and Federal and Confederate were alike indifferent as means, provided he attained that end; and in a neutral territory he might lawfully sell to either. The distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself, is made more clear by referring to the cases of *Holman v. Johnson* (Cowp. 341), and *Lightfoot v. Tenant* (1 B. & P. 551). In the first the plaintiff in a foreign country sold goods to the defendant, knowing that he purposed to smuggle them into England, and in one sense the plaintiff there sold them with the purpose that they should be so smuggled; but as he did not participate in any way in the unlawful transaction, the mere mental purpose did not avoid the contract of sale. In the second case (*Lightfoot v. Tenant*), the plaintiff sold goods to the defendant to be delivered abroad, in order that they should be sent unlawfully to the East Indies. After a verdict for the defendant on a plea alleging this fact, on motion for judgment *non obstante veredicto*, the objection was raised, that the mere mental purpose of the vendor did not avoid the contract of sale; but the objection was answered by suggestion of the fact that the plaintiff's participation in the unlawful transaction went beyond the mere mental purpose, that he was taken to be a party to the whole project, and to be acting in the execution thereof in the sale which was the cause of action: and upon these facts the contract

was held void. For these reasons we think the averment "that the goods were shipped for the purpose of being sent to an enemy's port," construing those words as we have done, is insufficient to establish that they were liable to seizure for a breach of neutrality.

The effect of the other allegations in the plea depends much on that which we have last considered.

If goods fit for immediate use in war, and therefore of the quality denoted by the term contraband of war, are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir William Scott's opinion, expressed in the case of *The Imina* (3 Rob. 167), attaches only where they are passing on the high sea to an enemy's port: "they must be taken *in delicto*, in the actual prosecution of a voyage to an enemy's port," p. 168. The liability, therefore, of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination, and they were not liable unless it distinctly appeared that the voyage was to an enemy's port.

The further allegation, that the ship was carrying goods and papers which made them liable to be seized, is immaterial as a ground of defence. For these goods are not alleged to be the plaintiff's goods, and the plaintiff is not shown to be responsible for the ship's papers, nor for any other goods than his own; and if the voyage was to a neutral port, and the law be as above stated, the facts alleged do not show that the ship and goods were liable to seizure. Furthermore the allegation that the ship was carrying papers which made it liable to be seized is not strictly accurate in reference to the law of nations. The papers alone are not a breach of neutrality, so as to work a forfeiture of the ship; they are only evidence from which a cause of forfeiture may be inferred; they may be evidence either of enemy's property, or of destination to a blockaded port, or to an enemy's port with contraband, and so be evidence on which the Judge may find a cause of forfeiture proved, but they are in themselves no cause of forfeiture. The language of Sir William Scott in the case of *The Franklin* (3 Rob. 217, 221), speaking of simulated papers, and saying that "this fraudulent conduct justly subjects the ship to confiscation," must be taken with reference to the question before him, whether the ship should be confiscated as well as the contraband cargo, and his decision is in the affirmative, and rightly, if the shipowner was knowingly conveying contraband to an enemy's port, of which knowledge papers indicating a false destination would raise a presumption.

These being the premises alleged in the plea, the allegation that the defendant was ignorant of them is of no avail. If the defence is that the plaintiff has concealed a fact which he was bound to disclose, the plea should have been framed accordingly. As it stands it shows no wrongful act on the part of the plaintiff towards the insurer.

If the proper construction of the premises in the plea be different from that which we have come to, still the allegation of the defendant's ignorance of those premises would not make the plea a good defence on the ground of concealment. The insurance is against capture, lawful and unlawful, and the defendant, in order to discharge himself, must show a concealment by the assured. Mr. Phillips, in his work on insurance, vol. 1, § 531, says, "concealment is where one party suppresses or neglects to communicate a material fact." It is quite consistent with anything appearing on this record that a letter from the plaintiff may have miscarried, or that the defendant may have remained in ignorance without any default of the plaintiff. The allegation, therefore, of the ignorance of the defendant is of itself immaterial, and has no effect in avoiding the policy; and the result is, that we consider the 7th plea to be bad.

PART 2.—We proceed now to the 8th plea, which in substance alleges that the ship did not sail on the voyage covered by the policy. The 3rd plea pleads the same ground of defence in direct terms. The 8th plea pleads it by way of estoppel, setting out a judgment in which the fact is supposed to be stated as a matter whereon the Court had adjudicated, and then relying on the judgment to estop the plaintiff from denying that fact. The same estoppel is the ground of two rejoinders to two replications, and the 8th plea and the two last rejoinders may be considered together.

The defendant, in support of these pleas, relied on the rule that sentences of foreign Courts deciding questions of prize are to be received as conclusive evidence, in actions on policies, on every subject immediately and properly within the jurisdiction of the Court on which it has professed to decide judicially—(see the opinions of the Judges in *Lothian v. Henderson*, 3 Bos. & P. 499)—and he contended that the judgment, as pleaded, showed that the voyage on which the ship was captured was not a voyage from London to Matamoras.

The plaintiff in answer contended—first, that the decision does not profess to decide the matter of fact on which the defendant relies; secondly, that if it had decided that matter of fact, still the decision could not be pleaded as an estoppel; and we are of opinion that the plaintiff is right.

The rule making the decision of a Court, which creates the status of a person or thing, conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the Quarter Sessions, and of prize in Prize Courts are examples. In *Hughes v. Cornelius* (2 Show. 232), the rule was applied within salutary limits, when, in trover for a ship by the former owner, the sentence of a Prize Court was held conclusive to show that the property

had been changed. See *Doe v. Oliver* (2 Sm. L. C. 634 (5th ed.), where the whole subject is fully considered with much learning and lucid arrangement. But the rule making the finding of a Judge upon any matter of fact upon which he professed to form his judgment conclusive upon all the world has been supposed to be anomalous, and to produce pernicious results. See Lord Eldon's opinion in *Lothian v. Henderson* (3 B. & P. 544) to that effect; also in *Geyer v. Aguilar* (7 T. R. 681, 696) Lord Kenyon speaks of the rule as a source of the grossest injustice. So in *Donaldson v. Thompson* (1 Camp. 429) Lord Ellenborough, speaking of this rule, says (p. 432), "the doctrine rests on an authority in Shower, which does not fully support it, and the practice of receiving these sentences often leads in its consequences to the greatest injustice." We would further refer to *Dalglish v. Hodgson* (7 Bing. 495), where Tindal, C.J., says (p. 504), that the sentence of the Prize Court is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is, and that it must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. Although these sentences must be received in evidence, still the precedents show that they have been carefully examined for the purpose of seeing whether the matter of fact, in proof of which they are adduced, was clearly and certainly found by the Judge whose sentence is relied on. *Bernardi v. Molleux* (Doug. 575), and *Calvert v. Bovill* (7 T. R. 523) are two amongst numerous cases which might be cited to this effect.

We now proceed to examine the judgment set out in the 8th plea. The condemnation appears to us to have been for carrying contraband of war intended to be for the use of the enemy of the United States, and the sentence, so far from deciding that the ship with the said goods did not sail on the voyage from London to Matamoras, appears to us to express that she was on that voyage when she was taken. The first matter of fact found by the Judge is that the ship was knowingly on the voyage aforesaid (that is from London to Matamoras), laden with contraband. The second is that the said ship with the said cargo was not truly destined to Matamoras, a neutral port, and for the purpose of trade and commerce, within the authority and intendment of public law; but was destined for some other port or place, and in aid and for the use of the enemy, and in violation of the law of nations, and that the ship's papers were simulated and false. The judgment must be set out truly in the 8th plea as in the rejoinders. If the Judge meant to find that the ship was not bound to Matamoras, but on the contrary to a port of the enemy, the finding would have been so expressed. But if he meant to find she was bound to Matamoras, not for the purpose of commerce with the inhabitants thereof, but for the

purpose of such a sale or transfer there as that the Confederates should get the use of the cargo, all the words of the judgment have their usual meaning and effect. We have no jurisdiction to inquire into, nor are we at all considering, the validity of the legal grounds of the judgment—our task is to ascertain what matter of fact the Judge found to exist. He may have considered that trading with the Confederates was not within the authority and intendment of public law, and in violation of the law of nations, and that a voyage to Matamoras, in order that the plaintiff's goods and cargo should be transferred from thence to some port or place for the use of the Confederates, was a destination of the cargo for such port or place, and made it liable to confiscation; and that the papers were simulated and false because they represented Matamoras as the final destination, and concealed a purpose of ulterior destination. By this examination of the judgment set out in the plea we are led to the conclusion that the learned Judge did not intend to find as a matter of fact either that the ship had not sailed on a voyage to Matamoras, or that after having so sailed she had deviated from that voyage. But, on the contrary, he condemned her as lawful prize because she was in prosecution of that voyage with an ulterior destination either for the cargo, or the ship, or both, as above explained.

The judgment therefore does not sustain the inferences of fact which the defendant seeks to establish thereby, nor does it sustain his claim of right to prevent the plaintiff from showing the truth in respect of this fact, and the plea is therefore bad.

So far that is the judgment of myself and my Brothers Byles and Keating. The other answer to that plea is the opinion of my Brother Byles and myself, and my Brother Keating does not assent nor dissent.

PART 3.—We (*Erie, C.J.*, and *Byles, J.*) are further of opinion that the 8th plea and the same rejoinders as last mentioned are bad, because the finding of a matter of fact in the course of the adjudication of a Prize Court cannot be pleaded as an estoppel in the cases where, if adduced in evidence, the judgment would be received as conclusive evidence of the fact so found.

Although the cases are numerous in which the evidence has been admitted, still there is no precedent for the plea of the fact as an estoppel that we have been able to find. The principle on which the evidence was held admissible is not clear. Lord Eldon, in *Lothian v. Henderson* (3 Bos. & P. 545), says, it was introduced at first against the insurers to prove the loss, and was afterwards used by the insurers for their defence. Lord Ellenborough, in *Fisher v. Ogle* (cited *supra*), speaks of it as a matter of comity between the two Courts. Such evidence does not fall within any legal description of matter of estoppel, nor is it guarded by the safeguards against abuse which

restrict matters of estoppel in respect of parties and of subject matter. In *Burrs v. Jackson* (1 Y. C. C. C. 585), cited in *Doe v. Oliver* (2 Sm. L. C. 428), Knight Bruce, V.-C., gives an elaborate judgment on estoppel, and lays down the principle thus (p. 595): "Generally neither the judgment of a concurrent nor of an exclusive jurisdiction is conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognisable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose and object." The admissibility of the judgments of Prize Courts upon matters of fact is not restricted within these limits; and although we are bound here to hold that they are admissible as far as the decided cases have established their admissibility, yet beyond that limit we would not go, and we consider that the attempt to use the judgment as an estoppel does transgress that limit, there being no precedent for it. In relying upon the absence of any precedent, we do not consider that this objection is confined to a matter of form; it restricts in some degree the tendency of such evidence to defeat real truth by technical proof, and it may have the effect of preventing the foreign judgment from being misunderstood or misapplied. If the judgment can only be adduced in evidence, and is not pleadable as an estoppel, the meaning may be ascertained by adducing in evidence the preliminary proceedings and other matters referred to in the judgment. In *Bernardi v. Mottoux* (2 Dougl. 573) Lord Mansfield admitted a French *Arrêt*, and expressed his opinion that the *procès-verbal*, on which the judgment was founded, ought to have been given in evidence at the trial by the plaintiff to show the meaning of the judgment, that is, to show whether the Court intended to find enemy's property, and so to prove a breach of warranty of neutrality, or to condemn by reason of an *arrêt* against throwing papers overboard. So in *Christie v. Secretan* (8 T. R. 192), the Court by the special case had power to refer to the proceedings before the Tribunal de Commerce, and also to a printed copy of a treaty between France and America, to show the meaning of the judgment. So in *Pollard v. Bell* (8 T. R. 434) the Court referred for the same purpose to the judgments in the "Tribunal de Commerce" at Bordeaux, in the "Tribunal Civil de la Gironde," and in the "Cour de Cassation" at Paris. So in *Dalgleish v. Hodgson* (7 Bing. 495), the circumstances under which the ship entered the River Plate were admitted in evidence to show the meaning of the judgment, that is, to show whether she was condemned for breaking blockade, or for disobedience to a municipal law of Brazil. These are the considerations which induce us to adhere to precedent, and reject the plea of estoppel.

If the judgment here in question should be hereafter adduced in evidence in support of the third plea, it may be that it would be found to refer to pleadings

and doctrines of public law, and to various classes and items of proof relating to acts and declarations of parties on board, and so forth; and if the judgment was given in evidence, these matters so referred to therein might be also adduced in evidence, and might show that the fact was not found by the Judge as supposed by the defendant. This inquiry would not tend to impeach the conclusive effect of the judgment upon the question of prize, but might prevent a mistaken assumption from prevailing over the truth.

For these reasons we give our judgment on these demurrers for the plaintiff.

We consider the 8th plea open to the further objection that it does not plead the issuable fact in respect of the voyage, but the evidence which might prove that fact: it pleads the *probans*, and not the *probandum*; but, as this objection would not apply to the rejoinder to the replication to the 3rd plea, we do not further advert to it.

Judgment for the plaintiff.

Ex. Ch. }
3 FEB. 1865. } GUMM v. TYRRE.

ERROR FROM QUEEN'S BENCH.

Coram—ERLE, C.J., POLLOCK, C.B., WILLES, J.,
CHANNELL and PIGOTT, BB.

*Ship — Mortgage — Freight — Interpleader —
Error—Common Law Procedure Act, 1854,
s. 32.*

A & B, the owners of a ship, mortgaged her to the plaintiff, and assigned to him all freight, &c., which might become due. A & B subsequently agreed with C for a cargo of timber, to be supplied by D in Cuba. The ship having been delayed on her outward voyage, the captain on his arrival at Cuba found that the cargo had been disposed of. He therefore purchased a cargo from D, on his owner's account, and gave D a bill of lading, which contained no specified sum for freight, but had lines drawn through the spaces where the amount would, in the ordinary course, have been inserted. Bills were drawn on C for the amount of the cargo, and the bill of lading was sent to him. C dishonoured the bills, and the defendant took them up for the honour of the drawer, and received the bill of lading. The plaintiff took possession of the ship on her arrival, and the defendant afterwards claimed the cargo as holder of the bill of lading. The defendant sold the cargo, and an interpleader issue was directed to try whether the plaintiff was entitled to freight:—

Held, that the plaintiff was entitled to freight, as the cargo was not the property of A & B, but was to have become their property on certain contingencies, which were never realised.

The objection was taken that Error would not lie on a special case stated on a feigned issue; but the Court

overruled it, on the ground that the 32nd section of the Common Law Procedure Act, 1854, gave Error in such a case.

SPECIAL CASE.—On the 12th of December, 1856, Messrs. Alfred Skeene and Archibald Freeman, of Old Broad Street, wood-brokers, and owners of the ship "Shakespeare," borrowed the plaintiff the sum of 2,500*l.*, and to secure the repayment thereof they, by indenture of mortgage, dated the 12th and registered the 19th of December, 1856, did covenant to pay the plaintiff the said sum of 2,500*l.* on the 8th of June, 1857, and did thereby mortgage to the plaintiff sixty-four shares, of which they were the owners, in the ship "Shakespeare," and in her appurtenances.

Messrs. Skeene & Freeman, as an additional security for the payment of the 2,500*l.*, by another indenture, also dated the 12th of December, 1856, did grant, bargain, sell, and assign unto the plaintiff, his executors, administrators, and assigns, all the freights, earnings, gains, profits, and advantages whatsoever to be made, earned, and gotten, and to become due and payable by, or by means, or for, or on account of the ship called "The Shakespeare;" and all and singular charter-parties and contracts in relation thereto, and all advantages to be had or derived therefrom, and all the right, title, interest, property, benefit, claim, and demand whatsoever at law and in equity of the said A. Freeman and A. Skeene into, upon, or out of the said freights and earnings, to have and to hold the said freights, earnings, and others the premises assigned, unto the said plaintiff, his executors, administrators, and assigns, upon trust for the payment of the said sum of 2,500*l.*; and by the same indenture the said A. Skeene and A. Freeman did authorise and empower the plaintiff to demand and recover all sums of money which were then or might thenceforth become due for freight and earnings of the said ship.

At the time these mortgages were executed, "The Shakespeare" was under charter-party to sail to Cuba and back, which voyage she performed, and on her arrival in England in 1857 (default having been made in payment of the 2,500*l.*), the plaintiff put a stop-order on the freight; whereupon Messrs. Skeene & Freeman agreed with the plaintiff that the future freight of the ship should be paid to him, and George Smart Justice, the captain of "The Shakespeare," was informed of this arrangement.

In the year 1856, Messrs. Skeene & Freeman had, through Messrs. Irving, Ebsworth & Co., of London, merchants, purchased a cargo of mahogany at Manzanilla, in the island of Cuba, for the payment of which Messrs. Irving & Co. had given a letter of credit on their correspondents, Messrs. Morrison of the Havana, undertaking to accept their drafts for the cost of the cargo, upon presentation, against the shipping documents to be forwarded to them by Messrs. Irving & Co. This transaction was completed by Messrs.

Skeene & Freeman sending a vessel for the cargo, and providing for the acceptances given by Messrs. Irving & Co. under their guarantee. In the month of October, 1857, "The Shakespeare" was under charter to carry a cargo of coals from Newport, in Wales, to St. Thomas's, in the West Indies, and an arrangement was made between Messrs. Irving & Co. and Messrs. Skeene & Freeman for another purchase of timber by the latter in the same way as before, to be brought to London by "The Shakespeare" on her return voyage. This arrangement was reduced into writing in the following letter, written by Messrs. Skeene and Freeman to Messrs. Irving, Ebsworth & Holmes:—

"London, 31st October, 1857.

"GENTLEMEN,—'The Shakespeare' is now on her outward passage for the West Indies, and after discharging her cargo at St. Thomas, will probably reach the south side of Cuba about the first or second week in January next. We shall feel obliged by your advising your friends at the Havanna that the ship will be at Manzanilla at about the time mentioned, that they may have ready, as explained to Mr. Morrison, a cargo of mahogany and lancewood spars of the same description as that shipped per 'The Frithrop,' in June last."

[Here follows a description of the cargo.]

"We are, &c.,

"SKEENE & FREEMAN."

This letter was forwarded by Messrs. Irving & Co. to Messrs. Morrison & Co., of the Havanna, in the following letter:—

"London, 31st October, 1857.

"DEAR SIRS,—We inclose a letter from our neighbours, Messrs. Skeene & Freeman, ordering a cargo of mahogany, &c., for their ship 'The Shakespeare,' now on her way to St. Thomas, and thence to Manzanilla, where your friends are authorised to purchase and ship by the said vessel a cargo of wood of the above description, strictly within the letter of instructions herein contained.

"We recommend this order to the attention of yourselves and friends at Manzanilla, and should your reimbursement for the cost be taken upon us, as in the case of 'The Frithrop,' your draft on us at usance will meet with due honour on presentation, against shipping documents and timely orders for insurance; but in passing this order to you, we think that we ought not to incur a greater responsibility than that of not parting with the shipping documents, when received on this side, until payment of the cost of the cargo, as we act as mere agents in the matter. The parties, Messrs. Skeene & Freeman, we believe to be highly respectable and trustworthy, and in the case of 'The Frithrop,' the drafts were timely provided for by them.

"We are, &c.,

"IRVING, EBSWORTH & HOLMES.

"Messrs. Robert Morrison & Co.,

"Havanna."

—and was again transmitted by them to their correspondents at Manzanilla, Messrs. Torres, Reigadas & Co., by whom the wood had been supplied on the former occasion.

"The Shakespeare" was, at the time those letters were sent, lying at Newport, taking in her cargo of coals for St. Thomas, and Messrs. Skeene & Freeman, on the 22nd of October, 1857, wrote the following letter to Captain Justice:—

"75, Old Broad Street, London,

"22nd October, 1857.

"DEAR SIR,—On receipt of your outward freight at St. Thomas's, you will please remit the same, after paying your disbursements there, to Charles Gumm, Esq., of Change Alley, Cornhill, London.

"We are, &c.,

"SKEENE & FREEMAN.

"Captain Justice, of barque

"'Shakespeare.'"

This letter the plaintiff forwarded to Captain Justice, who was at that time aware that Mr. Gumm was mortgagee of the ship and freight, and he, on the 4th of November, wrote the following to the plaintiff:—

"Newport, 4th November, 1857.

"DEAR SIR,—I acknowledge the receipt of your note of the 10th inst., and of course will act up to Messrs. Skeene & Freeman's instructions in regard to remitting you the freight from St. Thomas, after deducting the outward disbursements.

"I am, &c.,

"GEORGE JUSTICE, barque 'Shakespeare.'

"Charles Gumm, Esq."

On the 14th of November, 1857, whilst the ship was still lying at Newport, Messrs. Skeene & Freeman wrote Captain Justice a letter, of which the following is a copy:—

"London, 14th November, 1857.

"DEAR SIR,—With respect to your homeward cargo, our friends here have written Messrs. Torres & Co. to have ready for shipment against your arrival at Manzanilla, in January next, a cargo of 250,000 feet mahogany and 15,000 lancewood spars, to be of the same description in both cases as recently imported here by the 'Frithrop.' [Here follows description of the cargo.] The quantity of mahogany may be reduced in the same proportion that you obtain of sabica, always bearing in mind that you receive a full and complete cargo.

"We must impress you to be particularly cautious that on no consideration must our name transpire in the transaction; and you will understand that the cargo will be for account of Messrs. Irving, Ebsworth & Holmes, of London, by whom the vessel has been chartered, and cargo purchased of

Messrs. Morrison & Co., of the Havanna, the agents of Messrs. Torres & Co.

"We are, &c.,

"SKEENE & FREEMAN.

"Captain G. Justice, barque

"'Shakespeare.'"

The statements in this letter that "The Shakespeare" was chartered to Messrs. Irving, Ebsworth & Holmes, and that the cargo was to be on their account, they having purchased the same of Messrs. Morrison, are wholly without foundation. The ship had never been chartered to Messrs. Irving, Ebsworth & Holmes, and the cargo was to be solely on account of Skeene & Freeman.

"The Shakespeare" was detained a very long time at Newport taking in her cargo, and after she had started on her outward voyage, she was, on the 10th of December, 1857, obliged to put back again, have her cargo discharged, and the ship repaired, so that she did not leave Newport on her outward voyage to St. Thomas till the end of December, 1857.

On the 1st of March, 1858, Messrs. Skeene & Freeman wrote to Captain Justice (who received it whilst lying at St. Thomas), the following letter :—

"DEAR SIR,—We hope shortly to hear of your arrival at St. Thomas, where we trust you will get quick despatch. You will proceed with your vessel as early as possible to Manzanilla-de-Cuba, and address yourself to Messrs. Torres & Co., who will load your cargo in favour of Messrs. Irving & Co., of London, by whom full instructions will be sent out to await your arrival. By the next packet we shall address you more fully."

"The Shakespeare" arrived at St. Thomas on the 14th of March, 1858, and was detained by the illness of the crew until the beginning of May, and on the 2nd of May, 1858, Captain Justice, previous to his sailing for Manzanilla, remitted to the plaintiff 550*l.*, part of the amount of the outward freight, in the following letter :

"St. Thomas, May 2nd, 1858.

"SIR,—I inclose a bill to the amount of 550*l.*, having to retain the balance for disbursements, they being so very high on account of so much sickness here. By second and third mails will remit the second and third of the same tenor as one inclosed. Please acknowledge the same to Messrs. Skeene & Freeman.

"Yours, &c.,

"G. S. JUSTICE, barque 'Shakespeare.'"

"Charles Gumm, Esq."

A long correspondence took place between Messrs. Torres, Reigadas & Co., and Messrs. Morrison, and between Messrs. Morrison and Messrs. Irving & Co., from which it appears that from the first Messrs. Irving & Co. were informed that the order given by Messrs. Skeene & Freeman could not be executed, but that Messrs. Morrison and Messrs. Torres & Reigadas

were willing to provide for the ship a cargo as nearly like that originally ordered as possible. Messrs. Torres, Reigadas & Co. did in fact take some steps towards collecting a cargo for the ship, but owing to the long delay in her arrival, they disposed of what they had appropriated as "The Shakespeare's" cargo. Messrs. Skeene & Freeman were kept continually informed by Messrs. Irving & Co. of the communications of Messrs. Morrison & Co.

On the 16th of April, 1858, Messrs. Skeene & Freeman wrote to Captain Justice a letter of that date, of which the following is a copy :—

"75, Old Broad Street, London,

"16th April, 1858.

"SIR,—We duly received your letter announcing your arrival at St. Thomas, where we trust you would have good despatch. We hope that you will use every exertion to keep down the expenses of the ship during her stay at St. Thomas and at Manzanilla, and endeavour, if possible, to make some amends for the disastrous commencement of the voyage.

"We have a letter this morning from Irving, Ebsworth & Co., giving us extracts from a letter from the Havannah, dated the 22nd of March, stating the cargo intended for 'The Shakespeare' would be disposed of in consequence of the non-arrival of the vessel.

"We trust you will see Messrs. Torres & Co. on receipt of this, and do all that may be required in procuring a full cargo for the ship, and we beg that you will see that the wood (mahogany and cedar) is properly measured, and the spars fresh and large.

"We leave you to do the best in your power for our interest, as you are so well acquainted with the port, but on no consideration do you come away without a full cargo, and if necessary you may charter the vessel at 65/8 a load, if you cannot do better.

"We are, &c.,

"SKEENE & FREEMAN.

"Captain G. S. Justice."

Captain Justice reached Manzanilla on the 21st of May, 1858, and then received Messrs. Skeene & Freeman's letter, and on communicating with Messrs. Torres, found that no cargo was ready for him, and he then, on the 21st of May, wrote Messrs. Morrison the following letter :—

"Manzanilla, 21st May, 1858.

"GENTLEMEN,—'The Shakespeare' has arrived here, and I am rather surprised at there not being instructions for my homeward cargo, as I fully expected to have nothing to do but commence loading; but if you have not instructions, please let me know as early as possible, as I may form my future plans for the benefit of the owners. The ship is in quarantine for a few days at present, but please reply as early as possible.

"I remain, &c.,

"G. S. JUSTICE, barque, 'Shakespeare.'"

"Messrs. Morrison & Co."

Messrs. Morrison wrote Captain Justice the following letter (transmitting it through Messrs. Torres & Co.):—

"Havanna, 31st May, 1858.

"DEAR SIR,—We are in receipt of your esteemed favour of the 21st inst., and have carefully noted the contents. The long delay in the arrival of your vessel, besides other circumstances influencing the matter, compelled us to inform our friends in London, through whom we received your owners' orders for a cargo of wood for 'The Shakespeare,' that it would receive another destination. They answered us as follows—'16 April, 1858.—Your remarks respecting the wood cargo for "The Shakespeare" having been communicated to the parties interested, they inform us that instructions have been sent to the captain to charter his vessel should the cargo originally intended for him have received another destination ;' your owners, although frequently requested to do so, have never given us instructions what should be done in the event of the present contingency, when the wood intended for your vessel has been otherwise disposed of ; and we regret this the more as they appear to have left you also without orders. Our friends, Messrs. Torres, Reigadas & Co., to whom we have recommended your case, will no doubt have much pleasure in rendering you all the assistance in their power, and in case of your seeking a charter, we take the liberty of naming them to you as being in an excellent position to assist you.

"We are, &c.,

"R. MORRISON & Co.

"To Captain G. S. Justice, Brit. ship
'Shakespeare,' Manzanilla."

When the captain found Messrs. Torres, Reigadas & Co. had no cargo for him, he offered the ship for charter to Messrs. Ramirez & Co. They refused to take her on charter, and the captain could not get a charter from anyone, even at the lowest rates.

In consequence of not being able to charter the ship, *he determined to purchase a cargo on account of his owners*, and applied to Messrs. Torres, Reigadas & Co. for that purpose, and such purchase was accordingly made in the manner set out in the following correspondence, the statements in which as to matter of fact are correct, the freight in question in this cause is the freight on the cargo so purchased and paid for as hereinafter appears.

"Messrs. TORRES, REIGADAS & Co. to Messrs.

"MORRISON & Co.

"Manzanilla, 9th June, 1858.

"We have taken notice of the letter which you sent for Captain Justice, and, taking into consideration what you give us in charge, that we may do all that may be possible to us to relieve him from so painful a situation, we have agreed to give him 20,000 feet of mahogany, &c., that they may serve him as ballast to proceed to England (in case he should not succeed in completing his loading here, at the freight of 45/, which he has accepted, but which they cannot give

him assurance of before Saturday). If this bargain be ratified, we believe that the contrarieties which have happened to this vessel will have been remedied greatly, and that the owners may be content. We believe it unnecessary to advise you that when we dispatch 'The Shakespeare,' we shall send you invoice and bill of lading of our shipment and disbursement, drawing on you for the amount."

"TORRES, REIGADAS & Co. to MORRISON & Co.

"Manzanilla, 13th June, 1858.

"To-day we have to advise you that the captain of the 'Shakespeare' not having obtained the freight which had been offered to him, he succeeded, with our intervention, in contracting with Messrs. Ramirez & Co. for one part of mahogany, and three parts of cedar, in such manner that with this wood, and that which we have sold him, as we informed you, he will have almost a complete cargo for account of the vessel; if not conformably with the desires of the owners, at least with the greatest advantages which could be hoped for in the present circumstances.

"We have agreed to pay Messrs. Ramirez & Co. the amount of the wood which the captain has bought of them, and for its amount, as well as ours and our disbursements, we shall draw upon you when we send you the bills of lading and invoice."

"Manzanilla, 13th June, 1858.

"GENTLEMEN,—I am in receipt of your favour of the 31st ult., and have carefully noted the contents. The instructions I have received from London, while laying here, were to charter 'The Shakespeare' in case of not being able to do better, or in case of the cargo intended for the vessel being disposed of before my arrival, which has been the case. But not being able to charter, and no charter here to be had, even at the lowest freight, *and instructions not to leave Manzanilla without a full and complete cargo*, I have resolved to buy a cargo of wood, partly from Messrs. Torres & Co., and the remainder from Messrs. Ramirez & Co., of as much mahogany as I can get, and the remainder cedar, lancewood, &c. There will be about 100,000 feet of mahogany, and the remainder cedar, poles, fustic, &c.; so I consider that I have done what is best for the importer's interest, otherwise the ship would have had to have got home in ballast; all other ports being overstocked already with ships, there would have been no chance of chartering 'The Shakespeare' anywhere else, had I proceeded with her. I commence to take in cargo to-morrow, giving those parties bills in favour of Messrs. Irving, Ebsworth, and Holmes, of London; and I sincerely hope that this movement will meet the approbation of all parties concerned. You will please reply to this as early as possible, letting me know your opinion of this transaction, and if it meets your approval.

"I am, &c.,

"GEO. S. JUSTICE, barque 'Shakespeare.'

"Captain Justice to Messrs. Morrison & Co."

Messrs. Morrison wrote Captain Justice, in answer, the following letter :—

"Havanna, 23rd June, 1858.

"DEAR SIR,—We have duly received your valued favour of the 13th instant, and have carefully noted its interesting contents. As far as may be permitted us to express any opinion upon the course you have pursued to protect the interests of your owners, we should say, that we think you have done the best under the circumstances. We are entirely without instructions from London, and we merely take an interest in the matter now from a desire of being serviceable to, and saving the principals in the business as much from loss as possible. We, therefore, trust soon to hear that you have completed the loading of your vessel, so as to enable her to return to England, and we remain, &c.

"R. MORRISON & Co.

"Captain Geo. S. Justice, British barque 'Shakespeare,' care of Messrs. Torres, Reigadas & Co., Manzanilla."

"MORRISON & Co. to TORRES, REIGADAS & Co.

"Havanna, 17th June, 1858.

"We have received your favour of the 9th instant. We note the agreement which you have made with the captain to give him 20,000 of mahogany, &c., in order to serve him for ballast to return to England, in case he should not succeed in completing the cargo of 'The Shakespeare,' at a freight of 45/3, which he has accepted; and we take this opportunity with pleasure, in the name of the owners of 'The Shakespeare,' to thank you for the earnestness with which you cared for their interest. We cannot but confidently believe that they will be thankful for the succour which you have given to their vessel. It is the most efficacious to remedy the contrarieties which have pursued it. In conformity with your advice, we prepare to give all proper honour to your drafts, in the terms indicated by you."

"MORRISON & Co. to TORRES, REIGADAS & Co.

"Havanna, 23rd June, 1858.

"We have received your favour of the 13th instant. We note your disposition for loading 'The Shakespeare,' with which we are agreed; and we communicate what you say to your correspondents. We inclose a letter for Captain Justice, to whom you will be good enough to deliver it."

The letter to Captain Justice, here mentioned, is of the above date, already set out.

The cargo thus purchased was then shipped, and on its being received on board, the captain gave Messrs. Torres & Co. the following (in part printed) bill of lading, which was filled up by them, and is in the Spanish language, of which the following is a translation. The original is annexed, and is to be taken as part of the case :—

"I, George S. Justice, captain of the English barque

'Shakespeare,' which now lies anchored in the port of Manzanilla, ready to make her voyage for that of Falmouth, declare that I have received on board the said vessel, and under cover thereof, and from Messrs. Torres, Reigadas & Co.

"Mark S. F. 121 pieces of mahogany, containing 24,009 superficial feet.

"Mark S 90. 90 pieces of mahogany, containing 81,530 superficial feet.

"Mark S 127. 127 pieces of cedars, containing 96,369 superficial feet.

"Mark O 225. 225 pieces of cedar, containing 152,680 superficial feet.

"Mark 30. 30 tons of fustic.

"Mark 1733. 1733 yards of Gaza spars.

"Which I acknowledge to have been delivered to me, to my entire satisfaction, and bind myself, on my arrival in safety with my said vessel, to deliver in the like good order in the said port, or in such other my manifest may appoint. To order —, who —, on faithful delivery thereof being shown, shall pay me freight and conveyance. To the due fulfilment whereof I bind my person and goods, and especially the said vessel, with all the appurtenances, according to the practice and law of commerce, signing five of the tenors, whereof one only to be accomplished.

"Manzanilla, 17th July, 1858, the day before she sailed.

"The Nos. 174, 193, 199, 186, 137, and 222, six pieces of cedar returned by the master at the last moment, are to be deducted from the 225 of the mark O."

Messrs. Torres, Reigadas & Co. sent an invoice to Messrs. Morrison & Co. headed as follows :—

"Invoice of the value and charges of the effects which we have shipped on the English barque 'Shakespeare,' Captain G. S. Justice, bound to Falmouth, by order of Messrs. R. Morrison & Co. of the Havanna, and for account of risk of whom it may concern."

And they sent such invoice, with the signed bill of lading, in the following letter :—

"Messrs. TORRES, REIGADAS, & Co., to
Messrs. MORRISON & Co.

"Manzanilla, 18 July, 1858.

"'The Shakespeare' will sail to-night for her destination, and we inclose you invoice and bill of lading, in duplicate, of the cargo which we have shipped, the measurement in detail of the wood, and the receipt of the captain for the money we have furnished him with. We charge you with \$26,650,36, the amount of the invoice. You will see that the bills of lading are made out to order, in order that you may indorse them in favour of the proper party."

The captain had, in the interim, sent the following letter to Messrs. Skeene & Freeman :—

"Messrs. SKEENE & FREEMAN.

"Manzanilla, 4 July, 1858.

"GENTLEMEN,—I received your letter of the 15th instant, and carefully noted its contents. As has been already stated, in consequence of the non-arrival of 'The Shakespeare,' her intended cargo was disposed of; therefore I was placed in an awkward position. Previous to receiving your letter, I had already been trying to charter, but could not succeed, there being no cargo here, nor chance of getting chartered, even at very low freight. The mahogany here is so scarce, that the whole belonging to all parties would only make about three-parts of a cargo for the ship.

"I wrote to Messrs. Morrison, thinking they had fresh instructions about another cargo, as the first had been disposed of. Their reply was, that I had been sent out instructions how to act about a cargo or chartering the ship. As I could not charter, and very little use in going away from here to seek one elsewhere, nothing appearing in any of the ports, and all ports being overstocked with ships, and nothing for them, so I resolved to purchase a cargo on ship's account from whom I could get it. I got from Messrs. Torres & Co. about 26,000 feet of mahogany, and 2000 lance poles; from Ramirez 315,000 feet of mahogany, 96,000 feet of cedar, and 20 tons of fustic; and not being able to get more mahogany, will have to fill up with cedar from Messrs. Torres & Co., as I cannot do otherwise; and, under the circumstances, everything has been done for your interest that can be done on my part. Now, the only difficulty is to keep your name out of the transaction; but I will give bills on Messrs. Irving & Co. of London, although I have no instructions for to do so. I could not have acted otherwise, or come home in ballast.

"'The Shakespeare' is better than half loaded, and expects to sail from here about the 15th instant."

No bills were, in fact, drawn by the captain. The amount of the invoice was paid by Morrison & Co., in their account current with Torres & Co.

Messrs. Morrison & Co. transmitted the bills of lading to Messrs. Irving & Co., and drew on them in two bills for 4,232*l.* 4*s.* 1*d.*, the amount of the cargo and of the ship's disbursements. These bills were presented to Messrs. Irving in due course for acceptance, but they refused to honour them; and in consequence of such refusal, Mr. Morison, sen., of the firm of Messrs. Morrison of the Havanna, who was then in London, arranged with the defendant, Mr. Tyrie, to accept and take up the bills for the honour of the drawer. He did so, receiving at the same time the bill of lading, which was delivered by Messrs. Irving & Co. to him, indorsed in blank by Torres, Reigadas & Co. The said bills were duly paid by the defendant at maturity.

Before the complete loading of the ship at Manzanilla, on the 28th of June, 1858, in London, Messrs. Skeene & Freeman stopped payment, of which notice

was given to the plaintiff by Messrs. Irving & Co. On the 6th of July, 1858, Skeene & Freeman were adjudicated bankrupts.

At the end of September, 1858, the ship arrived and called at Falmouth for orders, and by the direction of the assignees of Messrs. Skeene & Freeman, Captain Justice brought the ship to London, and took her into the West India Dock, but at Gravesend the plaintiff took possession of the ship and her cargo, and placed a person on board of her. Up to this time (except as herein appears) the plaintiff had not taken possession of the ship as mortgagee or owner.

After the arrival of the ship in dock, the defendant lodged the bill of lading with the Dock Company, and under the indorsement of Torres & Co., wrote—"I claim the cargo, G. S. Tyrie," and before the cargo was landed caused Captain Justice to be served with the following notice:—

"To the Captain of the Ship 'Shakespeare.'

"As solicitor for and on behalf of the holder of the bill of lading of the cargo of mahogany, timber, and wood on board your vessel, I hereby give you notice not to part with or deliver up the same, or any part of it, except on the production of such bill of lading, and in the event of your parting with the same, or any part of it, after this notice, you will be held liable for all losses, costs, damages, and expenses which they may sustain or incur in consequence of your neglect of this notice.

"E. WALTON, 30, Bucklersbury."

The cargo having been landed in the dock, on the 27th of October, Captain Justice lodged with the Dock Company the usual stop for freight, under the 8 & 9 Vict. c. 91, s. 51. On the same day the plaintiff, on his own behalf, lodged a similar stop for the freight, claiming the same as mortgagee of the ship.

On the 10th of December, 1858, the stop put on the cargo by Captain Justice was transferred to the plaintiff by the following notice:—

"To the directors of the East and West India Dock Company.—Pursuant to Act 8 & 9 Vict. c. 91, s. 51, the under-mentioned goods, imported in the month of October, 1858, per 'The Shakespeare,' Captain Justice, from Manzanilla-de-Cuba, have been stopped for freight, subject to my directions; you are hereby authorised to transfer the said stop to the order of Charles Gumm.

| Mark. | Description of goods. |
|-------|--------------------------------------|
| | All goods landed. G. S. JUSTICE." |

The cargo was never offered to the assignees of Skeene & Freeman.

The plaintiff claiming the freight, and the defendant denying that any was payable, the defendant from time to time as he required, took the whole of the timber out of the dock, and paid the Dock Com-

pany 1,934*l.* 10*s.* 5*d.*, the amount claimed by the plaintiff for freight, the payment of each instalment of freight and the receipt of the timber in exchange being under protest, and with a written denial of the liability of the goods to any freight.

The defendant then brought two actions against the company to recover back the amount so paid, and the Dock Company having interpleaded in such actions, the following order was made :—

“*Tyrie v. The East and West India Dock Company.*— Upon hearing the counsel for the defendants, for the plaintiffs, and for Charles Gumm, the claimant, and upon reading the two affidavits of George Collier, I do order that the defendants do invest the three sums for which these actions are brought in Exchequer bills, to be deposited as may be agreed upon between the plaintiff and the claimant, to abide further order herein, and that all further proceedings in this action against the Dock Company be stayed. And I further order that the parties do proceed to the trial of the three issues in which the claimant Charles Gumm shall be the plaintiff, and the now plaintiff herein shall be the defendant, the issue to be, first, whether any and what freight is payable for the goods; second, whether Gumm was entitled to any freight, legally or equitably, as against the now plaintiff; third, whether the captain is entitled to any freight as against the now plaintiff. And I further order that there be no costs to the Dock Company, and that the costs of this application as between Gumm and the now plaintiff, including costs of action against the Dock Company, be reserved. And I further order that the said issue be delivered in three weeks, and returned by the defendant therein in ten days, and be tried in London. And I certify this to be a proper case to be attended by counsel. Dated this 18th day of November, 1859.”

The defendant received the goods under the circumstances before stated, and sold them.

Should freight be payable, the gross amount is 1,395*l.* 4*s.*

The Court were to be at liberty to draw any inference from the facts herein stated, which, in their opinion, ought to be drawn by a jury.

The question for the opinion of the Court is, whether the plaintiff or the defendant was entitled to succeed on the several questions raised by the aforesaid interpleader issue, and judgment was to be entered accordingly.

The case was argued in the Court of Queen's Bench in Hilary Term, 1864, when judgment was given for the plaintiff.*

On that judgment the defendant now brought error, and on the case being called on, a preliminary objection was taken at the hearing, that error did not lie on a special case stated in a feigned issue.

M. Smith, Q.C.—This is a special case on an interpleader issue, stated by the Court of Queen's Bench, on which error could not have been brought before the Common Law Procedure Act, 1854,

King v. Simmons, 7 Q. B. 289; 1 H. of L. Ca. 754.

The question is, does the 32nd section of that Act give error? It is submitted that it does not. If it had been meant that it should do so, it would have been enacted in express terms. That section merely provides that “error may be brought upon a judgment upon a special case, in the same manner as upon a judgment upon a special verdict.” That cannot mean a special case, in every instance, but only in those cases where before that enactment error would have lain on a special verdict. The case of

Snook v. Matlock, 5 Ad. & E. 239; and

King v. Simmons (*supra*);

shows that, under the old law, error would not lie on a special verdict on an interpleader issue. Nor does error lie upon a judgment on a feigned issue brought under the 46th section of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, and in

Thorpe v. Plowden, 2 Exch. 387,

the Court of Exchequer Chamber quashed a writ of error so brought. To allow error to lie on this case would be to alter the whole bearing of the Interpleader Act, 1 & 2 Will. 4, c. 58. For the 2nd section of that Act, enacts that the judgment in an interpleader issue should be final. The Common Law Procedure Act, 1854, does not affect that section.

[ERLE, C.J., referred to the 15th and 16th sections of the Common Law Procedure Act, 1860.]

Those sections merely refer to the Judge at Chambers, and enable him to state a special case; that is, if that course seem to him better than sending the issue down to trial; but they do not affect the final character of the proceedings when once the issue has gone down to trial. He also referred to,

Withers v. Parker, 4 H. & N. 810.

ERLE, C.J.—We are all of opinion that Error will lie on a special case stated on an interpleader issue.

The case was then argued for the defendants by *Sir G. Honyman (Lush, Q.C., with him)*.

The question whether the plaintiff is entitled to claim freight depends on the question, whether there was a contract to pay freight at the time the cargo was loaded,

Sanders v. Vanzelles, 4 Q. B. 260.

What are the facts of the case? The captain being unable to get a cargo in any other way, buys one on Skeene & Freeman's account. It was the duty, therefore, of Skeene & Freeman to take up that cargo, and if they had done so, no freight would have been payable,

Alexander v. Sims, 5 De G. M. & G. 57.

The plaintiff can stand in no better position than Skeene & Freeman would have stood in, if they had not become bankrupt. The bill of lading is made out

to the order of the vendors, simply for the purpose of preserving their lien. The cargo was Skeene & Freeman's, and if they had accepted it, there would have been no claim for freight. Can freight become payable simply on account of the misconduct of Skeene & Freeman?

As to the form of the bill of lading, it is not the custom of mercantile men ever to strike anything out. Instead of filling up the bill of lading, they draw a line through the space where the amount of the freight would, in the ordinary course, have been entered. That means that their payment of freight was not contemplated.

ERLE, C.J.—The judgment of the Court below must be affirmed. The ship belonged to Skeene & Freeman who mortgaged it to the plaintiff, and he as mortgagee took possession of the ship, and became entitled to freight, if any were payable. It has been urged that the cargo was the owners' cargo, and that, therefore, no freight was payable. The whole fallacy on the part of the defendants consists in saying that the cargo had become the property of Skeene & Freeman. It is true that goods were put on board, which on certain contingencies would have become their property. But those contingencies were never realised. The bill of lading was drawn in the shippers' name, and to their order. The cargo was never offered to Skeene & Freeman. On these facts, I think, that freight was payable, and that the reasons given in the Court below, are sound reasons for their judgment.

Judgment affirmed.

EX. CH. } SCOTT v. THE LONDON
7 FEB. 1865. } DOCK COMPANY.

Coram—ERLE, C.J., CROMPTON, BYLES, BLACKBURN, MELLOR, and KEATING, JJ.

Presumption of Negligence from mere happening of Accident.

The plaintiff, a custom-house officer, in discharge of his duty, entered the defendants' premises, and, while passing under a crane, was injured by the fall of some bags of sugar. There was no warning of the danger, and no explanation of the cause of the accident by the defendants:—

Held (ERLE, C.J., and MELLOR, J., dissentientibus), that, as the goods were under the management of the servants of the defendants, and something happened out of the ordinary course, of which there was no explanation, there was reasonable evidence of negligence.

This was an action for negligence. The plaintiff, a custom-house officer, was on the defendants' premises in discharge of his duty. While passing from one warehouse to another he went under a crane, fixed over a doorway, and used for lowering and hoisting goods. He heard the rattling of a chain, and six bags of sugar fell on him and injured him. He could give

no farther account of how the accident happened, and no explanation of it was given by the defendants. There was no fence or other obstacle to prevent any one passing under the crane.

Martin, B., directed a verdict to be entered for the defendants, on the ground that there was no evidence of negligence.

In Michaelmas Term, 1864, the Solicitor-General obtained a rule nisi to set aside the verdict, and for a new trial, on the ground that there was evidence of negligence by the defendants' servants. This rule was subsequently made absolute,* on the authority of *Byrne v. Boadle* (3 N. R. 162; 2 H. & C. 722; 33 L. J. Ex. 13, (Martin, B., *dissentiente*); and following the decision in *Hammack v. White*, 31 L. J. C. P. 129.

Against that decision the defendants now appealed.

Field, Q.C. (Murphy with him).

The rule is, that where the evidence is equally consistent with the existence or non-existence of negligence, it is not competent to the Judge to leave the matter to the jury,

Cotton v. Wood, 8 C. B. (N. S.) 568.

And where it is equally consistent with the existence or non-existence of contributory negligence on the part of the plaintiff, the same rule applies.

[CROMPTON, J.—There are many cases in which the facts are such, that the jury are much the best judges whether the evidence is equally consistent with the existence of negligence, or the reverse.]

[BLACKBURN, J.—The question whether the mere occurring of an accident is evidence of negligence depends on the nature and circumstances of the accident.]

[CROMPTON, J.—The word "fall" is used; that must mean something out of the ordinary course, and if so, there must be some negligence.]

There is no evidence that any of the defendants' servants were on the spot at the time. There are many causes which might have produced the accident.

[CROMPTON, J.—If that were the case it is not for the plaintiff to prove those things which lie entirely in the defendants' knowledge.]

[BLACKBURN, J.—There is an old pleading rule, that where matters lie more in the knowledge of the other side, they need not be pleaded with great particularity.]

This case differs materially from that of *Byrne v. Boadle* (*suprà*). This place is not a public highway, it is not even one where the public have a licence to enter. They are private premises on which the plaintiff entered in the course of his duty, and by virtue of his authority as a custom-house officer. The premises are especially meant for lowering and hoisting goods, and the Dock Company have a right so to use them in the course of their business. The plaintiff

* *Ante*, p. 59.

knew what would be going on in the docks, and it was his duty to look out. His neglect to do so absolves the company from all liability.

[BLACKBURN, J.—That would be of considerable force if the bags were being lowered in the usual way and he ran against them; but here they “fell.”]

Toomey v. London, Brighton, and South Coast Railway, 3 C. B. (N. S.) 146;

Cornman v. South-Eastern Railway Company, 4 H. & N. 781;

Wilkinson v. Fairrie, 32 J. L. Ex. 73;

Hammack v. White, 11 C. B. (N. S.) 588;

Cook v. Waring, 32 L. J. Ex. 262; 2 H. & C. 338;

Boleh v. Smith, 7 H. & N. 786;

Gallagher v. Humphreys, 6 L. T. 684;

Christie v. Griggs, 2 Camp. 79;

Corpus v. London and Brighton Railway Company, 5 Q. B. 747.

The Solicitor-General (T. Jones with him).—I quite agree that if the evidence is as consistent with the non-existence as with the existence of negligence, it ought not to be left to the jury. But it frequently happens that the jury are the best judges whether that is the case.

It has been said that the mere happening of the accident does not prove negligence,

Skinner v. London and Brighton Railway Company, 5 Exch. 787.

But that must depend upon the circumstances. The rule of pleading mentioned by Blackburn, J., is

founded on the first principles of justice, and is as applicable to evidence as to pleading. How the goods were being lowered is a fact especially in the knowledge of the defendants' servants. The question is, how much can the plaintiff be reasonably expected to prove? He cannot possibly know how the bags fell.

[MELLOR, J.—Can that alter the rule of proof, to diminish the evidence which is required to sustain his case?]

He must raise a presumption of negligence which it will be for the defendant to negative. He establishes the fact that something happened out of the common course, that the bags “fell” with great violence. That fact is open to explanation, but as it stands it is more consistent with the supposition that they fell from being carelessly treated, than that they were being lowered in the ordinary course of business. [He was stopped by the Court.]

ERLE, C.J.—The judgment of the Court below must be affirmed, the majority of the Court being of opinion that there is reasonable evidence of negligence. Where the goods are under the care and management of the servants of the defendants and something occurs out of the usual course of things of which there is no explanation, that is reasonable evidence of negligence. As I and my Brother Mellor read the facts in this case, we cannot find the reasonable evidence of want of care which is found by the rest of the Court.

Judgment affirmed.

EQUITY.

Lords Justices. } JOFF v. WOOD.
14, 15, 28 FEB. 1865. } Re SMITH.

Domicil—Change of Domicil.

Domicil can only be changed animo et facto. The factum alone is an equivocal act, and insufficient to effect the change.

The dictum of LORD CRANWORTH in Whicker v. Hume (7 H. of L. Ca. 124), and Moorhouse v. Lord (10 H. of L. Ca. 272; 1 N. R. 555), that, in order to acquire a new domicil, a man must intend exuere patriam—approved.

This was an appeal from an order of the Master of the Rolls, made on the rehearing of the case, and reported, *ante*, 5 N. R. 151, where the facts are fully stated.

Hobhouse, Q.C., and H. M. Jackson, for the appellant.

Selwyn, Q.C., Serjt. Atkinson, and B. L. Chapman, for the respondents.

Hanson, for the Crown.

Hobhouse, Q.C., in reply.

The arguments of counsel, on this appeal, were a repetition of those made use of in the Court below.

28 FEB. 1865.

KNIGHT BRUCE, L.J. said: If Mr. Smith, the *propositus* in this case, had been in the employment of the Government in India, the burthen of proof would have lain upon those, who asserted that his domicil remained Scotch at his death, to establish that assertion; but Mr. Smith was never in the service or employment of the Indian Government: he had resided in India, for the mere purposes of his private business, and appeared always to have retained the wish and intention of returning finally to Scotland. His correspondence and conduct appeared to prove that distinctly. A permanent residence in India seemed never to have been in his contemplation. It appeared, therefore, to his Lordship, that Mr. Smith's domicil of origin was never lost, or intended to be lost, and that the conclusion of the Master of the Rolls was right. Some, at least, of Lord Kingsdown's observations, when advising the House of Lords, in the case of *Moorhouse v. Lord* (1 N. R. 555), seemed especially apposite to the present contention.

TURNER, L.J., said: The point principally relied upon by the appellant, in support of the contention that there was a change of domicil from Scotland to India, was the long-continued residence of the

testator in the latter country; but nothing was better settled as to the law of domicil, than that domicil could be changed only *animo et facto*: and although residence might be decisive as to the *factum*, it could not, when looked at with reference to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he had been before domiciled, even although his residence there might be of long continuance, did not of necessity show that he had elected that place as his permanent and abiding home. He might have taken up and continued his residence there for some special purpose, or he might have elected to make the place his temporary home; but domicil, although in some of the cases spoken of as home, imported an abiding and permanent home, and not a mere temporary one.

The effect of residence on domicil was well explained by Dr. Lushington in his very able judgment in *Hodgson v. De Beauchesne* (12 Moo. P. C. C. 285), and his Lordship entirely agreed in the opinion there expressed upon the subject. In considering cases like the present, it was to be borne in mind that the acquisition of a new domicil involved an abandonment of the previous domicil; and in order, therefore, to effect the change, the *animus* of abandonment, or, as Lord Cranworth had strongly expressed it, the intention *exuendi patriam* must be shown. Whether the intention of abandonment might not be inferred from long and continuous residence alone, in a case in which there were no other circumstances indicative of the intention, was a question which, in the present case, it was unnecessary to decide, and on which, therefore, he would give no opinion. Such a case could very rarely, if ever, occur.

In the course of the argument, on the part of the appellant, reliance had been placed on the cases which had been decided as to the covenanted servants of the East India Company, but there were considerations connected with those cases which had no bearing in a case like the present. At the times when those cases were decided, the government of the East India Company was, in a great degree, if not wholly, a separate and independent government, foreign to the Government of this country; and it might well have been thought that persons, who had contracted obligations with such government for service abroad, could not reasonably be considered to have intended to retain their domicil here. They, in fact, became as much estranged from this country, as if they had become servants of a foreign Government.

There were also several minor circumstances on which the appellant had relied, such as the purchase of land in India by the testator when he embarked in the indigo trade, his having retained his house in Calcutta during his temporary visit to this country in 1819, and the fact of his having been described "as of Calcutta," in his will, and in the other instruments which he executed on the occasion of that visit; but the purchase of the land in India was a necessary incident of the trade in which the testator was then engaged; his retaining the house in Calcutta was the natural consequence of his intending to return to that place; and the description of him in his will, and in the other instruments, was almost necessary for the purpose of identifying him. Those circumstances, therefore, were in his Lordship's opinion, but of little, if any, weight. Supposing, then, that the case had rested there, he should have felt scarcely a doubt upon it; but any doubt, which there might have existed, seemed to him to be wholly removed by the evidence on the part of the respondents. It appeared by that evidence, that the testator was the only son of a Scotch laird, and proprietor of a considerable estate; that he went to India in 1805, when a minor, and did not attain twenty-one until 1807. Upon the death of his father in 1814, he became entitled to the surplus proceeds of the sale of the paternal estate, which was then heavily encumbered. The estate, however, remained unsold; but immediately upon the death of his father, he wrote a letter to his mother, indicating strongly his intention of ultimately returning to Scotland. In 1819 he came over to that country, and during his residence there took an active part in the conduct and management of the estate, and from the time of his going back to India after that visit, until the time of his death, he kept up a constant correspondence with the agents of the estate, in the course of which he constantly referred to his return to Scotland, directed different parts of his estate to be planted, and mentioned his intention of building upon it; and further, he remitted money to be applied in paying off the charges upon the estate, and he actually purchased an adjoining property, and caused himself to be put upon the roll of the freeholders of his county. Those were facts which, in his Lordship's opinion, conclusively showed that the testator, so far from having abandoned his domicile of Scotland, which, it was to be observed, was his domicile of origin, and, therefore, not so readily to be considered as abandoned as an acquired domicile,—desired at all times to retain it.

It had been attempted, on the part of the appellant, to displace the weight of this evidence by suggesting that the testator had acquired a domicile in India before 1814, and thus bringing the case within the range of the authorities in which it had been held that a domicile could not be resumed by intention merely, but his Lordship saw no foundation for that suggestion. The evidence showed there was correspondence before 1814 of a similar purport to that

which he had referred to, and besides there could have been no change of the domicile before 1807, when the minority ceased, and the interval between 1807 and 1814 would, as he thought, have been too short to have operated to change the domicile in the absence of any evidence of intention to change it.

The appeal would be dismissed with costs.

Master of the Rolls. } *Re THE KENTISH ROYAL*
23 FEB. 1865. } *HOTEL COMPANY.*

Practice—Company—Winding-up—Affidavit—
General Order of 11th of November, 1862,
Rules 4 and 73.

The Court has power to enlarge the time for the filing of an affidavit in support of a winding-up petition.

Rule 4 of the General Order to regulate the mode of proceeding under the Companies Act, 1862, issued on the 11th of November, 1862, is as follows—

"Every petition for the winding-up of any company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto, in the form or to the effect set forth in form No. 2 in the 3rd schedule hereto; such affidavit shall be made by the petitioner, and shall be sworn after and filed within four days after the petition is presented."

Rule 73 of the same General Order is as follows—

"The power of the Court, and of the Judge sitting in Chambers, to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, is unaffected by these rules."

In the present case a petition had been presented for the winding-up of a company, and an order for that purpose had been obtained. It appeared, however, that the affidavit verifying the petition had been filed on the seventh day after the presentation of the petition.

P. J. Wood, for the petitioner, applied to have the order drawn up, notwithstanding the fact that the affidavit had not been filed within four days after the petition had been presented.

He cited the above rules.

THE MASTER OF THE ROLLS said, that as no one objected, the order might be drawn up.

Master of the Rolls. } *ROBERTS v. ROBERTS.*
25 FEB. 1865. }

Will—Tenant for Life—Dividend.

A testator bequeathed stock to his widow for life, with remainder to his son; and died in 1817. The son bequeathed the residuum of his personal estate, which included the stock, to his wife for life, with remainder to his children; and he died in 1852. The widow, his mother, died on the 1st of January, 1865. A dividend

accruing due on the stock on the 5th of the same month:—

Held, that, as between the son's wife and his children, such dividend represented capital of the son's estate, and not income.

This was a petition presented by Anne Roberts, the defendant in the suit. A question arose as to the rights of Anne Roberts and her children in a sum of 124*l.*, under the following circumstances—

William Roberts, the elder, by his will, dated the 4th of December, 1817, bequeathed the residue of his personal estate to his wife, Mary Roberts, for life, and after her decease to his two children William Roberts, the younger, and Mary Hardcastle Roberts, absolutely, as tenants in common.

William Roberts, the elder, died on the 11th of December, 1817.

The residue of his personal estate consisted of certain stock.

Mary Hardcastle Roberts died in October, 1832, a spinster and intestate.

Thereupon one half of her moiety of the stock was transferred to her mother Mary Roberts. This reduced the stock to the sums of 6,862*l.*, and 1,650*l.*

William Roberts, the younger, by his will dated the 5th of February, 1845, bequeathed the residue of his personal estate, which included his reversionary interest in the stock, upon trust for his wife Anne Roberts for life, and after her decease for his children absolutely. He died on the 4th of August, 1852.

On the 28th of January, 1855, the executors of William Roberts, the elder, paid into Court the sums of 6,862*l.*, and 1,650*l.* stock.

Mary Roberts, the first tenant for life of the trust-fund, died on the 1st of January, 1865.

There was standing in the name of the Accountant-General, the sum of 124*l.* cash, being the half-yearly dividend which accrued due in respect of the sums of stock on the 5th of January, 1865.

The question was, whether this dividend was payable to Anne Roberts, the present tenant for life of the trust-fund, or whether it formed part of the capital of her husband's estate.

White, for the petitioner, and

Selwyn, Q.C., and *Horsely*, for an incumbrancer upon her estate, contended that she was entitled to the dividend in question. That sum had accrued due since the death of her husband, and was payable to her, as her first dividend.

Daniel Jones, for the children of the petitioner, was not called upon.

Surrage, for other parties.

THE MASTER OF THE ROLLS said, that the dividend formed part of the capital of the estate of William Roberts, the younger. If the Apportionment Act had applied to the present case, the executor of Mary Roberts would have been entitled to her apportioned

part of the dividend in question. The life estate of the petitioner commenced from the moment when the residue of the property of William Roberts, the younger, was ascertained, and she was entitled to a life estate in any sums to which he was entitled. He died in 1852, and the question was, what sums came to his estate!

It so happened that, four days after the death of Mary Roberts, one half-year's dividend fell into his residuary estate. Interest upon that sum was payable to the petitioner, but the sum itself belonged to the estate of her husband. Her estate began on the 1st of January, 1865; and she was not entitled to take the dividend, as if her estate had commenced in the month of July, 1864; but it was part of her husband's estate, and she was entitled to interest upon it from the 1st of January, 1865.

Kindersley, V.-C.

23 FEB. 1865.

FLOWER v. LONDON,
BRIGHTON, AND SOUTH
COAST RAILWAY COM-
PANY.

Railway Company—Compulsory Power to Purchase Land.

A railway company were empowered to take such land within the limits of deviation, as they should think necessary for the purposes of their Act:—

Held, that they would not be allowed to take land merely upon the affidavit of their engineer, that it was or would be required.

The plaintiff was owner of an estate at Battersea, which was under building agreements, and had been laid out in separate building plots, with roads; and houses had been erected upon some of the plots. The defendants were about to construct two lines of railway, under an Act of Parliament passed for that purpose in 1864, which would pass through the plaintiff's estate, the whole of which was included within their limits of deviation.

Various negotiations having taken place between the company and the plaintiff respecting the taking by the company of the land they required, the company on the 9th of January, 1865, served a notice, in the usual form, upon the plaintiff to treat for the purchase by them of land delineated in a schedule to the notice, and which land they alleged would be required for the purposes of their Act. The company required possession not only of the two strips of land requisite for the actual construction of the railroads, but of the entireties of the several building plots intersected by the strips. The plaintiff denied the right of the company to take compulsorily more land than would be required for the actual construction of the railroads, and refused to send in claims for more than would be so required.

The engineer of the company had in his affidavit stated that the whole of the plaintiff's premises was or would be required for the purposes of the railways.

The plaintiff by his bill, which was filed in consequence of the above circumstances, prayed that the company might be restrained from further proceeding upon, or with, or prosecuting the notice, so far as it related to the property which they alleged was not required for the purposes of the railway.

Glasse, Q.C. (Nalder with him), moved for an injunction in accordance with the prayer of the bill, and contended that it was incumbent upon the company to show for what purposes the entireties of the plots of land outside the strips were wanted, in order to give them a right to take them.

Roll, Q.C., and *Taylor*, for the defendants, having rejected the offer of the Vice-Chancellor, to be allowed to bring fresh evidence to show that the plots of land in question were wanted for the purposes of the Act, argued, that the company and their engineer were the judges of what was required for the purposes of the Act, and they referred to the words of the Act empowering the company to enter upon, take, and use, such of the lands within the limits of deviation as they should think necessary for the purposes of the Act.

The Court would not go behind the affidavit of the company's engineer. They cited,

Stockton and Darlington Railway Company v.

Brown, 9 H. of L. Ca. 246 ;

Crauford v. Chester and Holyhead Railway Company, 11 Jur. 917 ;

Cotter v. Midland Railway Company, 2 Ph. 469 ;

Sadd v. Maldon, 6 Exch. 143 ;

Richards v. Scarborough Public Market Company, 23 L. J. 110 ;

Galloway v. City of London, 4 N. R. 77, 422 ;

and referred to sections 16, 92, 119, and 128, of the Railway Clauses Act.

Glasse, Q.C., in reply, contended that in the case of *The Stockton and Darlington Railway Company v.*

Brown (loc. cit.),

the Court had been satisfied, by the answer and affidavits in corroboration, that the land was really required for the legitimate purposes of the railway company, and cited, in addition,

Bentinck v. The Norfolk Estuary Company, 8 De G. M. & G. 714 ;

Everasfield v. Mid-Sussex Railway Company, 3 De G. & J. 286 ;

These latter cases were merely the last of a long series of cases to the same effect. He further cited,

River Dun Navigation Company v. North Midland Railway Company, 1 Ry. C. 153 ;

Agar v. Regent's Canal Company, Coop. 77.

KINDERSLEY, V.-C., said, that the simple question was, whether the railway company had power to take any land, merely because the engineer of the company had made an affidavit that it was required, or would be. If the law were to that effect, according to the

authorities, he must follow them ; but such a law was likely to be most detrimental, no Court of Justice having power to look into the question. A railway company might employ a person who would make an affidavit, an honest one perhaps, stating that the land was wanted, when it would not be wanted within the fair meaning of the term. The case of *Stockton and Darlington Railway Company v. Brown (loc. cit.)*, was widely different from the present one. The other cases, he presumed, had been cited on the same side merely as leading up to that case. There evidence on both sides was laid before the Vice-Chancellor, and upon the result of that evidence the decision was come to : Here the defendant had declined to bring any fresh evidence upon the matter. It was contended that the words in the company's Act empowering them to take such land as they should think necessary, conferred on the company the arbitrary power they claimed. It was true that these words were strong, though not stronger than in many other Acts of a like nature ; nevertheless such a construction as that contended for by the company could not be allowed. From the shape of the pieces demanded, the presumption was, that such pieces were not really required for the purposes of the railway.

His Honour accordingly granted the injunction prayed for.

KINDERSLEY, V.-C. } BARKER v. PRILE.
21, 24 FEB. 1865.

Practice—Trustee's Costs.

Where a trustee filed a bill in order to be discharged from his trusts, though the funds might have been paid into Court under the Trustee Relief Act :—

Held, that he was not liable for any costs.

The plaintiff in this suit was a last surviving trustee, who had undertaken the trust when there was no probability of difficulties arising in the execution thereof ; but, having been for several years subjected to litigation and other annoyances, he filed this bill in order to have the trusts administered under the direction of the Court, and to be discharged from the same himself.

Glasse, Q.C., and *Swanston*, for the plaintiff, upon this point, argued, that the plaintiff had a right under the circumstances, to be entirely freed from the trusts, which he could not be if he had simply paid the money into Court, and, therefore, was entitled to his costs as between solicitor and client. They cited,

Coventry v. Coventry, 1 Keene, 758 ;

Gardner v. Downes, 22 Beav. 395 ;

Forshaw v. Higginson, 20 Beav. 485.

Osborne, Q.C., *W. H. Terrell*, *Baily, Q.C.*, *Archibald Smith*, *Owen*, and *Macnaghten*, for various defendants, contended that it was the duty of the trustee to have saved expense, by paying the trust-money into Court, instead of instituting these proceed-

ings, and, therefore, that he ought to pay the difference between the expense incurred in this suit, and what would, on a liberal scale of allowance, be the estimated costs, which would have been incurred by the proper mode of proceeding,

Wells v. Malbon, 8 Jur. (N. S.) 249.

24 FEB. 1865.

KINDERSLEY, V.-C., said, that when the plaintiff undertook the trust it was a simple one, and there was no reason then to suppose that complications would arise, but it had turned out otherwise, and he had been subjected to much trouble and litigation for many years; he was now getting old; these were good reasons for his wishing to be discharged from the trusts. Before the year 1847, in such a case as this, there was no doubt that he would have had a right to file a bill, praying that the trusts might be administered under the direction of the Court, and that he might be relieved from the same; the question now was, had the Trustee Relief Act altered this right of the plaintiff. It was contended that it could not signify whether the trustee was discharged or brought the money into Court, and though it was true that in the latter case he would remain a trustee, that would not matter, inasmuch as he would be discharged from all liability.

Now though the plaintiff, if he had merely paid in the trust-money, would be discharged from liability, he would still remain a trustee, and would be liable to the vexation of being made a party to a suit. In the case of *Wells v. Malbon* (*loc. cit.*) his Honour perfectly concurred, but, in the present instance, he thought the trustee had a right to be completely discharged, and he would allow him his costs as between solicitor and client.

Kindersley, V.-C. } WEBB v. WARDLE.
25 FEB. 1865.

*Practice—Abatement by Death of Co-Defendant
—Amendment—Revivor.*

When a bill has abated by the death of a co-defendant, the plaintiff, if he wish to make the representative of that co-defendant a party to the suit, must proceed by way of revivor, and not by way of amendment. And, if he proceed by way of amendment, the person so made a party may move to take the amended bill off the file, and, in such motion, should bring the other defendants before the Court.

The plaintiff, Mrs. Webb, filed her bill in 1861, against Thomas Wardle and Mary Ashford, as the personal representatives of two deceased trustees of property, of which she was practically the absolute cestui-que-trust, charging the deceased trustees with gross breaches of trust. On the 10th of April, 1864, Thomas Wardle, died. The plaintiff amended her bill, making Mary Wardle, the executrix of Thomas Wardle, a co-defendant with Mrs. Ashford.

B. B. Rogers, on behalf of Mary Wardle, moved that the amended bill might be taken off the file for irregularity. He urged that the plaintiff should have revived the suit; for that where an accounting defendant died, the suit was abated. He cited,

Drake v. Symes, 2 De G. F. & J. 81, to show that there being another defendant was no objection to the motion.

Baily, Q.C., and *R. G. Welford*, for the plaintiff, said that no advantage could accrue to Mrs. Wardle, if this motion should be acceded to. She had been guilty of great delay; for she had been served with interrogatories on the 28th of December, and had made no objection till the time for answering them had expired.

Phear, for the defendant Mrs. Ashford.

KINDERSLEY, V.-C., said that he thought Mrs. Wardle was entitled to what she asked. Amending the bill, in case of abatement by the death of a co-defendant, instead of proceeding by way of revivor, was contrary to the practice of the Court. Nor did he think Mrs. Wardle had disabled herself by delay or acquiescence from making this motion. She was right in bringing the other defendant before the Court; for such an order as was asked could not be made behind her back. Mrs. Wardle would add the costs of the other defendant to her own, and plaintiff would pay them to her.

Kindersley, V.-C. } WEEKS v. STOURTON.
25, 27 FEB. 1865.

Practice—Mortgage to be paid off under Order of Court—Affidavit of Documents.

When a mortgage is to be paid off under the order of the Court, if the mortgagor requires an affidavit of documents from the mortgagee, he must pay the costs occasioned by such an affidavit, and ought to give some notice of his intention to require its production.

In this suit a decree had been made,—for payment by the defendant to the plaintiff of principal and interest of a sum secured by equitable mortgage, and of costs, at the Rolls Chapel, on a given day, and for sale in default thereof. At the time fixed, the solicitors of the plaintiff and defendant attended at the Rolls Chapel: when the latter asked the former to produce an affidavit of documents; and, on this being refused, declined to make the payment ordered. The plaintiff then applied by summons in Chambers, that there might be a sale, or that another day for payment might be fixed. The matter was adjourned into Court.

Glasse, Q.C., and *Hemings*, for the plaintiff, cited, *Hughes v. Williams*, 1 Kay, App. iv.;

and contended, that, in the present case, the right of the mortgagee was to receive the money due, after which he might be asked for documents.

Baily, Q.C., and Horsey, for the defendant; and

Osborne, Q.C., and Webb, for the trustees of the defendant's marriage settlement, contended that the defendant was entitled, under the decree, to an affidavit of documents, and had not been able to obtain it.

THE VICE-CHANCELLOR said: When a mortgage was paid off under the order of the Court, the payment of the money due, and the delivery of the documents, should, strictly speaking, take place simultaneously. But these strict rights were not practically insisted on. Out of seventy cases where payment was ordered at the Rolls Chapel, in seven only was it made there; and it was stated, that no question had ever before arisen as to an affidavit of documents. The mortgagee would have to pay the costs occasioned by such an affidavit; but, in the present case, no such an affidavit had been included in the costs, and the costs had been already paid. He did not wish to say that the mortgagor must give notice of his requiring such an affidavit before the taxation of costs, though it would be the most convenient course so to do; but that he should give some notice that he would require it, and must offer to pay the costs thereof. He should grant the plaintiff's application.

Kindersley, V.-C. } TRAVIS v. ILLINGWORTH.
28 FEB. 1865.

New Trustees—Invalid Appointment.

A power of appointing new trustees, vested under a will in the surviving or continuing trustee or trustees, was executed by the only trustee, he himself retiring:—

Held, an invalid appointment.

This was a suit to administer the estate of a deceased testator. In the will there was contained a proviso that if the trustees thereby appointed, or who might be appointed as there undermentioned, should depart this life, or decline or become incapable to act in the trusts thereby in them reposed and thereby created, then, and as often as such events should happen, it should be lawful for the surviving or continuing trustee or trustees, his or their executors, administrators, or assigns in writing to appoint one or more person or persons to be a trustee or trustees, in the room of the trustee or trustees so dying, declining, or becoming incapable to act therein as aforesaid, and thereupon the trust estate, moneys, and premises should be vested in the new trustee or trustees, jointly with the surviving or continuing trustee or trustees, or solely, as occasion should require, and it was declared that the new trustees should have the same powers and authorities as if they had been appointed by the will.

Only one of the trustees appointed by the will acted, the others disclaimed. The trustee who did act, in 1862 purported to appoint two new trustees, himself retiring.

Glasse, Q.C., and Waller, for the plaintiff.

Lesson, for the supposed new trustees.

Little, for other defendants, argued, that the appointment was clearly bad, on account of the old trustee retiring at the same time as the new trustees were alleged to have been appointed,

Stones v. Rowton, 17 Beav. 30;

"Declining trustee" meant one who declined at the first.

Glasse, Q.C., in reply, said that Stones v. Rowton (loc. cit.) was an exceedingly narrow construction of the power, which had been disapproved of by Lord Cranworth in

Pell v. De Winton, 2 De G. & J. 17, and would not be followed. "Declining" must mean declining at any time.

KINDERSLEY, V.-C., said, that "declining" must be taken to mean, "declining to act at any time," in the same way as "dying" and "becoming incapable to act" must mean to refer to any time; but he must hold the appointment bad, on account of the fact that the trustee, when he retired, was not the "surviving or continuing trustee."

Kindersley, V.-C. } MORGAN v. MORGAN.
22 FEB., 1 MARCH, 1865.

Practice—Dower Suit—Minor—Guardian ad Litem—Costs.

In a dower suit, a guardian ad litem of a minor made an irrelevant defence:—

Held, that the guardian ad litem was not compellable to pay the costs imposed on the plaintiff by such defence.

In this suit, the defendant being a minor, a guardian *ad litem* was appointed, who raised a defence which was held by the Court to be irrelevant, and thereby caused the plaintiff to incur the costs of preparing an affidavit.

J. W. Chitty, for the plaintiff, asked that he might have the costs of that affidavit,

Bamford v. Bamford, 5 Haro, 205.

Freeman, for the guardian ad litem, contra.

KINDERSLEY, V.-C., said, that in a suit for dower no costs were generally allowed, but that when an improper defence was raised, it was usual to allow the costs which had been thereby incurred. He would consider, however, whether, as the minor could have no costs allowed against him, the guardian *ad litem* was liable in the same way as the next friend of an infant plaintiff.

1 MARCH, 1865.

HIS HONOUR now said, that he had considered this point, and was of opinion that the guardian *ad litem* could not be made to pay the costs asked for. He did not, however, mean to say that the guardian would not have been compellable, if it had been a case of gross misconduct.

COMMON LAW.

C. C. R. }
21, 28 JAN. 1865. } REGINA v. ROWTON.

Coram—COCKBURN, C.J., ERLE, C.J., POLLOCK, C.B., WILLIAMS, J., MARTIN, B.; WILLES, BYLES and KEATING, JJ.; CHANNELL, B., BLACKBURN and MELLOR, JJ.; PIGOTT, B., and SHEE, J.

Evidence—Character—Evidence to Rebut.

When the prisoner calls evidence of good character, the prosecutor may call evidence to rebut it. (MARTIN, B., dubitante.)

Evidence of the general character of a prisoner must be confined to evidence of reputation and not of disposition; and the personal judgment of a witness as to the prisoner's disposition cannot be received in evidence. (ERLE, C.J., and WILLES, J., dissentientibus.)

The prisoner was indicted for an indecent assault. Witnesses were called who gave the prisoner a good character, and then a witness was called to rebut this evidence, and was asked, "What is the defendant's general character for decency and morality of conduct?" his reply was, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him, but my opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality":—

Held, that the answer was improperly left to the jury.

The following case was reserved and stated by the Deputy-Assistant Judge of the Middlesex Sessions.

"James Rowton was tried before me at the Middlesex Sessions on the 30th of September, 1864, on an indictment which charged him with having committed an indecent assault upon George Low, a lad about fourteen years of age.

"On the part of the defendant several witnesses were called who had known him at different periods of his life, and they gave him an excellent character as a moral and well-conducted man.

"On the part of the prosecution it was proposed to contradict this testimony, and a witness was called for that purpose. This was objected to by the defendant's counsel, who contended that no such evidence was receivable, and cited the case of *Regina v. Burt and Others*, 5 Cox. C. C. 284.

"I thought the evidence was admissible, and after the witness had stated that he knew the defendant, the following question was put to him—"What is the defendant's general character for decency and morality of conduct?" His reply was, 'I know nothing of the neighbourhood's opinion, because I was only a boy at

school when I knew him, but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality.'

"It was objected that this was not legal evidence at all of bad character.

"I considered that it was some evidence, and I left the weight and effect of it as an answer to the evidence of good character to be determined by the jury.

"The defendant was convicted, and is now in prison awaiting the judgment of your Lordships.

"The questions upon which I respectfully request your decision are:—

"1st. Whether when witnesses have given a defendant a good character, any evidence is admissible to contradict.

"2ndly. Whether the answer made by the witness in this case was properly left to the jury."

The case was first argued before the Court of Criminal Appeal, on the 19th of November, 1864, and was subsequently argued before the fifteen Judges on the 21st and 28th of January, 1865.

Sleigh, for the prisoner.

No direct evidence is admissible to contradict evidence of good character,

Regina v. Burt, 5 Cox. C. C. 284.

It is to be noticed that the passage in

Buller, N. P. 296,

cited by counsel in that case, professes to be founded on the cases of

Martyn v. Hind, 1 Cowp. 441;

Clark v. Periam, 2 Atk. 338,

which do not support it. To admit such evidence would be to try a new issue not on the record.

[ERLE, C.J.—Calling evidence to character is optional on the part of the prisoner. Does he not call it subject to any inquiry that may be raised?]

Evidence to character was first admitted in *juroribus vita*, at a time when a great proportion of offences were capital, for the purpose of guiding the executive, as to whether sentence of death should be carried out,

Regina v. Harris, 7 St. Tr. 929.

[WILLES, J., referred to Fitzjames Stephen's General View of the Criminal Law, c. 8, p. 309.]

As to the second question, it is a general rule, that whether to support or impeach the character of a defendant, neither can any specific fact nor anything of individual knowledge, be given in evidence,

Johnson's and Webster's Dictionaries, *sub voc.* "character;"

Hardy's Case, 24 St. Tr. 1076 (Erskine's definition of character);

2 Stark. Evid. 304 (3rd ed.);

1 Phillips, Evid. 508 (3rd ed.);

Best, Evid. 326—329, ss. 254—286 (ed. 1855);

3 Benth. Rat. Jud. Evid. 195;

Rees v. Rookwood, 18 St. Tr. 211;

Rees v. Davison, 31 St. Tr. 189, 190;

Rees v. Jones, 31 St. Tr. 310;

Mawson v. Hartsink, 4 Esp. 102;

Attorney-General v. Hitchcock, 11 Jur. 478.

[ERLE, C.J.—Lord Ellenborough expressly sanctions, in the passage you have read from *Davison's Case*, the witness giving evidence from his personal knowledge.]

[BLACKBURN, J.—Lord Ellenborough asks the question, "From your knowledge of Mr. Davison's character and conduct, do you think him capable of committing a fraud?"]

G. Tayler for the prosecution.

Evidence is clearly admissible to contradict evidence of good character.

[COCKBURN, C.J.—We are all agreed on that point.]

[MARTIN, B.—I do not agree, but I will not differ from the rest of the Court. I think the practice of 150 years should not be disregarded.]

As to the second question, there is no rule of law excluding this answer; and as every rule of law is a rule of exclusion, if there be no rule it is admissible. It was said that the witness ought to have been stopped after the first part of his answer. But if there is to be a local limit, where is the line to be drawn? The evidence of specific facts, and that drawn from individual opinion are placed by the argument on the other side, on the same footing. But they are widely distinct. I admit that the evidence of specific facts is inadmissible; but I contend that evidence of individual opinion is admissible to prove the character of the prisoner.

[COCKBURN, C.J.—You are using "character" in the sense of "disposition." General evidence to character relates to the prisoner's conduct, and not to the tendency of his mind.]

His conduct is the result of that tendency. The foundation of evidence to character is the knowledge acquired of the disposition and tendency of the accused person. The prisoner raises the issue; he says, my tendency is such, that it is more than usually improbable that I should commit the offence with which I am charged. Reputation is merely the repetition of the judgment of others. Is the individual opinion and observation of the witness himself to be excluded from that judgment?

Rees v. Jones (*ubi supra*),

is the only authority in which individual opinion is excluded. If the witness is only to speak from the aggregate opinion, he could go into a neighbourhood

and collect evidence; but evidence so obtained is not admissible,

Mawson v. Hartsink, 4 Esp. 102.

[POLLOCK, C.B.—That is because it is mere hearsay. But when a man says, I have lived twenty years in the neighbourhood of this man, and his character is good, he speaks to a fact.]

If this is law, a master who has had a servant many years in his employ, and during that time has heard no general report as to his character, would not be allowed to speak as to his individual knowledge. What is really in question, is the disposition of the prisoner; and individual opinion is stronger evidence of that than is the general opinion of a neighbourhood,

Penny v. Watts, 2 De G. & S. 525;

1 Taylor on Evidence, 350 (4th ed.);

2 Starkie on Evidence, 308;

Best on Evidence, 637, s. 519 (ed. 1860);

Rees v. Hardy, 24 St. Tr. 1079;

Holt's N. P. 541;

R. v. Murphy, 19 St. Tr. 725.

Sleigh, replied.

COCKBURN, C.J.—The question for the Court in this case is, whether an answer given by a witness called by the prosecution to rebut the evidence of general good character offered by the defendant, was a proper and admissible answer. The question which was asked was, "What is the defendant's general character for decency and morality of conduct?" The answer given by the witness was, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." The question is, was that answer properly received in evidence? I am of opinion that it ought not to have been received; and that the conviction cannot stand. Two questions arise: the first, whether when evidence of good character has been given by the defendant, evidence of bad character is admissible to rebut it. I am clearly of opinion that such evidence may be received. That there is no experience of such practice, is easily explained. It is because a hint from the counsel for the prosecution that the evidence to character adduced on behalf of the prisoner will be met by a rigid cross-examination, or by counter evidence, is sufficient to prevent any such evidence being offered. But when we are asked whether such evidence is admissible, speaking logically and reasonably, it is impossible to come but to one conclusion. It has been said that the question of the prisoner's character is a collateral issue. That is hardly so. It is one of the elements of the case, which the jury has to take into consideration as affecting the probability of the offence having been committed. That being the case, it cannot be held that evidence of character should be altogether one-sided:

that the prisoner should have the credit of assumed good character, which the prosecutor is not at liberty to contradict.

The second question is, Whether the answer given by the witness in this case, was one which it was proper to leave to the jury? It strikes me that, for the consideration of this question, it is necessary to determine what is the meaning of evidence to character. Now, it is laid down in the books, that the prisoner may give evidence of general character. I mean of reputation, and reputation only. I quite agree that what you want to get at is the tendency of the prisoner's mind, but the only way the law allows you to get at it, is by evidence of general conduct. That is the sense in which the word character is used in all the text-books. Mr. Russell, in his book on the Criminal Law, says: "The inquiry must also be made with reference to the general character of the prisoner, for it is general character alone which can afford any test of general conduct, or raise a presumption that the person would not then begin to act an unworthy part: and, therefore, proof of particular transactions, in which the prisoner may have been concerned, are not admissible."—(Vol. 2, p. 784, 3rd ed.)

We are not now to consider whether it be desirable that the law of England should be altered. It may be, that it would be expedient to import into our system the practice of some other countries; to enter into the circumstances of the former life of the prisoner, and from those facts to raise a presumption that he was a person likely to commit the crime with which he was charged; or it might be desirable to allow evidence of specific facts to be given. But as the law stands, no one could contend that evidence of specific facts is admissible, although one fact would weigh more with the jury than any evidence of general reputation. The fact is, that this part of our law is an anomaly. The practice which precludes the prosecutor from entering into the previous bad character of the prisoner, arose from the desire of giving to the prisoner every advantage. The prisoner may raise the issue of character; but the evidence must be confined to evidence of reputation. In practice, it is true, the rule is somewhat relaxed. The evidence of witnesses gains weight by being introduced with a statement of the opportunity they have had for forming a correct judgment. The limit in practice is, perhaps, sometimes overstepped; but when we come to inquire what that limit is, it is clear that the evidence must be confined to general reputation, and that individual opinion is not admissible. Suppose a witness were called, who said, "I have had no opportunity of judging by general reputation, but my own opinion is," &c., such evidence would not be received.

This is the rule which governs the prisoner's counsel in examining the witnesses to character, and the same rule must be applied to evidence called to rebut the presumption raised by the prisoner in his own favour. In the present case the witness at once disclaims all

knowledge of the general reputation of the prisoner. His answer, in fact, comes to this: "In my opinion, the prisoner's disposition is such as to make it probable that he would commit an offence of this kind." Such an answer is inadmissible. An objectionable answer was given to a proper question. Had the Judge stopped this answer, or told the jury that they must dismiss it from their minds, the verdict would not have been affected. But such was not the case. I offer no opinion as to what the law should be, I take my stand on it, as it is. I find it universally laid down that evidence to character must be evidence of general reputation; and that facts, though they would be much stronger evidence, are excluded. I offer no opinion as to whether it be expedient or not. I deal with the law as I find it. The answer, therefore, was inadmissible, and the conviction must be quashed.

ERLE, C.J.—I agree with the Lord Chief Justice in many parts of his judgment. I agree that witnesses may be called to prove that the character given to a prisoner is undeserved. We ought to be regulated by the interests of truth, and if the prisoner calls evidence of character which is false, that evidence should be contradicted. The first question, therefore, should be answered in the affirmative. On the second question I do not agree with the Lord Chief Justice. Individual facts, I think, should be excluded. I do not stop to inquire whether an answer, otherwise unobjectionable, but having some admixture of fact, would be properly received. The important question is, What is the principle upon which evidence to character is admissible? I am of opinion that evidence of character is admissible for the purpose of showing the disposition of the person accused, and raising a presumption from that disposition that he did not commit the crime with which he is charged. That disposition may be ascertained either from the personal experience of the witness or the general opinion of others. And the question is, whether the Court can receive with regard to the character of the accused, the personal estimate of a witness who disclaims all knowledge of the general opinion of the neighbourhood. In my opinion evidence from both sources is admissible; that from general rumour, and that which is derived from the personal experience of those who have the opportunity of observation. I never heard a witness examined to character without his being questioned as to his personal experience. If a witness were to say "I have had the accused in my service twenty years, but I never heard a human being speak of him," according to the Lord Chief Justice, the evidence of that witness would not be admissible. But personal experience gives a cogency to the evidence such as mere report can never impart. General rumour is the general inference from a number of specific statements; and those statements are derived

from personal experience. I attach very considerable weight to this, because the best character is that which is least talked about.

The argument of Mr. Taylor commanded my assent, and I found my opinion confirmed by the case of *R. v. Davison (ubi supra)*. In that case eleven witnesses were called to character, and five or six speak to their personal experience, and it is only when evidence of a specific fact is offered that Lord Ellenborough interferes. It is true that the answer of the witness in this case is open to the same objection, after stating his personal experience he adds a specific fact. But I do not stop minutely to analyse the answer; the general question is one of great importance. I am of opinion that both question and answer in the present case were admissible.

COCKBURN, C.J.—I would not wish to say anything in reply to the Lord Chief Justice of the Common Pleas, but I would not wish it to be supposed that I am of opinion that negative evidence should be excluded. If a witness were to say "I have known the prisoner twenty years, and never heard anything against him." That is the best evidence, that he bears a good character. On the first point, all my Brothers agree: and on the second, all, except the Lord Chief Justice of the Common Pleas, and my Brother WILLES.

MARTIN, B.—As to the second question, whether the answer of the witness in this case was properly left to the jury, I entirely agree with the Lord Chief Justice of the Queen's Bench. Had the decision of the first question depended on me, I should have taken time to consider. The Common Law of England is a law of practice; and where the practice is bad, the Legislature interferes. When a defendant is indicted for an offence, a distinct issue is before the Court, and to that issue the evidence must be confined. Were I inquiring simply for my own satisfaction into the guilt or innocence of any person, my first inquiry would be into that person's character. But when he is indicted, that inquiry is not allowed. A practice has arisen, from the tenderness our law feels for the defendant, of allowing him to call witnesses to character. But no case has been cited in which evidence to rebut the evidence of good character has been admitted; no text-book has been quoted to support the contention that it is

admissible. This absence of all precedent may have arisen from the causes pointed out by the Lord Chief Justice of the Queen's Bench. I think it might have been better to leave the law as it stood,—an anomaly. From that I do not think any harm could have arisen; but I can conceive cases in which far too much weight may be given to evidence of bad character. No doubt logically this evidence is admissible, and though I think the practice of two hundred years should be supported, yet I will not dissent from the opinion of the rest of the Court.

WILLES, J.—I am of opinion that the ruling of the learned Judge on both points was right. I should be glad if the Court could exclude this evidence, on the grounds stated by Martin, B.; but I do not think they can do so. All the text-books, Roscoe, Starkie, and Phillips, show that it has been the practice to admit such evidence. On the second question, I agree with the Lord Chief Justice of the Common Pleas. I feel bound to deliver my opinion at length, why it is that evidence of character is admissible. It does not raise a collateral issue; it is, on the contrary, evidence strictly relevant to the issue. It is true that the prosecution cannot raise that issue; for if it were allowed to do so, we should have the whole life of the prisoner ripped up, and a man would be overwhelmed by prejudice, instead of being convicted on direct evidence. The really material question is, whether the character or disposition of the prisoner is such as to make it probable he would commit the crime with which he is charged. Evidence of particular facts are excluded,—first, because they are irrelevant, and also because no notice has been given to the prisoner of any specific charge against him. The evidence of character is derived either from general rumour, or from individual judgment, and the latter is the better kind. In the ordinary transactions of life we see this opinion acted on; for the character of a servant you apply to the master, and for that of a child to its teachers. In this answer the witness speaks first from his own judgment, and secondly from reputation, which is evidence of the judgment of others. I am of opinion that this answer was admissible.

COCKBURN, C.J., added, that Byles, J., who was at Chambers, and had heard part of the argument, agreed with the majority of the Court on both points.

Conviction quashed.

EQUITY.

House of Lords. } GANN v. THE COMPANY
13, 14 JULY, 1864. } OF FREE FISHERS OF
3 MARCH, 1865. } WHITSTABLE.

Present—THE LORD CHANCELLOR, LORD WENSLEY-DALE, and LORD CHELMSFORD.

Watercourses—Public Right of Navigation—Ownership of Soil of Estuaries—Anchorage Dues—Several Fishery—Illegal Prescription.

The ownership of the soil of navigable rivers and estuaries which is vested in the Crown, is, and always has been, subject to the public right of navigation.

No grant of the bed of a river or estuary could, even before Magna Charta, have been made by the Crown, except subject to such right.

A claim to levy toll, by virtue of the ownership of the soil of an estuary, from ships casting anchor on such soil, where no special consideration is offered in return for such toll, is bad, and cannot be supported by any length of enjoyment.

This was an appeal, on a special case, from a decision of the Court of Exchequer Chamber (reported 1 N. R. 397; s. c. 13 C. B. (N. S.) 853), affirming a decision of the Court of Common Pleas (reported 11 C. B. (N. S.) 387).

The action was brought to try the right of the respondents, a company incorporated by the 33rd Geo. 3, c. xlii., under the name of "The Company of Free Fishers and Dredgers of Whitstable, in the County of Kent," to try their right to receive a payment of one shilling for every vessel anchoring on certain land, covered with sea, the soil of which was claimed by them.

The material facts upon which the respondents based their claim, were as follows—

Previous to the execution of certain indentures, dated in October, 1792, the fee simple of the manor of Whitstable, which included the fishery of Whitstable, being a royalty of fishery or oyster-dredging within the manor, was vested in Edward Foord and James Smith, as tenants in common.

By indentures of lease and release, dated respectively the 24th and 25th of October, 1792, after reciting, that, within the manor of Whitstable, there was, and for many hundred years then last past there had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, partition was made of the manor, whereby so much thereof as consisted of "all the said royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within

the said manor, and all the ground and soil of the said fishery extending as hereinafter is mentioned, and also the customary payments usually and of right made to the lord of the said manor, for or on account of the anchorage of any ship or vessel, or for the landing of any goods or merchandise within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments for the regulation whatsoever at the Water Court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong unto, and are the property of the lord of the said manor, by reason of any wrecks of the sea, or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all remedies for the recovery of the said premises respectively," was conveyed to Thomas Foord in fee, by whom the same was subsequently conveyed to the respondents in fee.

The deed of the 25th of October, 1792, provided, that, in order to ascertain the boundary of the said oyster-fishery, and how far the right of Thomas Foord and his heirs therein should extend, from thenceforth the south and south-east sides of the sea-beach at Whitstable, as the same should from time to time be thrown up by the sea, should be taken as the boundary between the lands of Thomas Foord and the lands of the other parties thereto; and that such sea-beach, and all the lands and grounds from thence into the sea, as far as the fishery extended, whether the same should be more or less than the quantity of land then belonging to the fishery, should be held by, and be the property of Thomas Foord.

This provision was adopted, by reference, in the deed by which the fishery was conveyed by Foord to the respondents.

The case, which was settled by the parties, further stated, that the appellant was the owner of a vessel called "The Amoret," and that on the 29th of September, 1860, the vessel cast anchor at Whitstable, on the land covered by the water of the sea, and below low-water mark; but that the spot where the vessel so anchored was within that portion of the manor of Whitstable and the aforesaid fishery, which was claimed by the respondents under the above deeds, and under the circumstances therein stated, as their soil and freehold; that the respondents' oyster-beds extended from the shore for about two miles out to sea; and that the vessel was anchored about half a mile from the shore upon part of the land claimed by the respondents, but not then used as oyster-beds.

The respondents' claim was for one shilling for the

anchoring on the soil, which they alleged to be theirs. The respondents gave evidence to prove, and the jury found, that from 1775, continually down to the present time, they and those under whom they derived title had from time to time claimed as of right to take, and had taken, the sum of one shilling from vessels casting anchor within that portion of the manor on which "The Amoret" had cast anchor, and that they claimed to take it as a customary payment for such use of the soil.

The Court of Common Pleas held that the Crown might lawfully have made a grant of the soil of the sea-shore, and of the right to anchorage; and that the evidence was sufficient to justify the presumption of the claim having a legal origin; and, further, that the right to the anchorage was not destroyed by the severance of the marine from the terrestrial part of the manor.

From this decision the appellant appealed to the Court of Exchequer Chamber. The appeal was heard on the 28th of November, 1862, before Pollock, C.B., Channell, R., Wightman, Blackburn, and Mellor, JJ., who unanimously affirmed the judgment of the Court below.

Prentice, in support of the appeal.

1st. Anchorage can only be claimed in respect of a harbour or haven. All the definitions of the term show that,

Wharton's Law Lexicon, and Todd's Johnson's Dictionary, *sub voce* "anchorage."

So Hale, *De Portibus Maris*, p. 74, whereas he makes no mention of anchorage in his treatise, *De Jure Maris* (see p. 36).

[THE LORD CHANCELLOR inquired, what might be the meaning of the expression in Hale, *De Portibus*, 74—"When a ship 'at full sea' casts anchor."

Clark, amicus curiæ, suggested that the analogy of the French expression, *pleins mer*, and the context, showed that the passage referred to a ship at high water casting anchor on ground between high and low water-mark.

His Lordship approved of the explanation.]

The anchor here, no doubt, was cast within the limits of the port of Faversham; but the respondents do not pretend to be owners of that harbour.

2 Callis on Sewers, 53,

lays down that a subject cannot claim the soil of the sea below low-water mark; but even if that were otherwise, it is clear that the Crown never could, at any time, either since Magna Charta or before it, have made any grant of the soil, either of the sea or of a navigable river, except subject to the *jus publicum navigandi*,

3 Kent's Comm. 521, 522 note;

Chitty's Prerogatives of the Crown, 143;

Attorney-General v. Burrigide, 10 Price, 850.

[THE LORD CHANCELLOR inquired if there was any case where nets pitched by virtue of a several fishery

had been injured by a ship passing without any fault or negligence on the part of the ship.

LORD CHELMSFORD.—That was exactly what happened in *Mayor of Colchester v. Brooke*, 7 Q. B. 339; and there the ship was held not liable.]

3rd. No toll can be taken on the sea, or on a navigable river, except where some *quid pro quo*,—some corresponding consideration, connected with the payment of the toll, is given in exchange, which consideration enures for the benefit of those from whom the toll is levied: as in the case of a harbour,

Com. Dig. "Tolls" C., citing 1 Vent. 71; and 1 Mod. 71 and 104;

Bac. Abr. "Customs" D.;

Warren v. Prideaux, 1 Mod. 104.

A prescription to take tolls from ships for merely passing a navigable river is absolutely bad for want of consideration, because passing and re-passing is of right to all; and no length of time can make such a claim valid,

Mayor of Nottingham v. Lambert, Willes, 111;

Com. Dig. "Prerogatives" D. 48.

We admit that the Crown may create a harbour, and may thereby get the right to charge tolls for the use thereof—

Mayor of Exeter v. Warren, 5 Q. B. 773;

Case of the London Wharves, 1 Wm. Bl. 581.

Payment of tolls for the use of a harbour is a reasonable restriction on the subject's right of free navigation, and for his own benefit. Here, the respondents do not pretend to be owners of the harbour within which the fishery is situate: they simply claim by virtue of the grant of the manor and the fishery to charge a toll upon every vessel anchoring within the limits of their fishery, for whatever purpose the vessel may anchor. The right to cast anchor is a necessary incident to the right of navigation, and if the public have a right to cast anchor, as incident to the right of navigation, how can they be made to pay for that right which they had before?

He then commented on the judgment of the Court of Common Pleas, which, he insisted, assumed the whole question. He also showed that the allegation made there, that the Act, by which the respondents were incorporated, confirmed the deeds whereby the soil of the fishery was vested in them, was erroneous, as the Act only gave them liberty to fish. He contended further, that the consideration of the maintenance of the fishery, relied upon by the Court, would not support the toll.

With regard to the judgment of the Court of Exchequer Chamber, he denied that the appellant derived such a particular benefit by anchoring in the fishery as would support a toll, as he always had the right so to do.

He gave up the point of the personal exemption of the appellant, by virtue of the charters of the Cinque Ports, which was urged in the Courts below.

Meadows White, on the same side, cited,
Somerset v. Foggoell, 5 B. & C. 875,
 as to the grant of a fishery not passing the soil; and
 commented upon,

Scriv. Copyholds, 666.

He insisted that, by the laws of England, Scotland,
 and America, the right of navigation was paramount
 to the right of fishing.

As to Scotland—

Bell, s. 645, 646;

Erskine's Instit. b. 2, tit. vi. s. 17.

As to America—

Martin v. Waddell, 16 Peters, U. S. Rep. 369;
 cited in Angell's Tidal Waters, 42;

Den v. Jersey Company, 15 Howard, Rep. (N. S.)
 426;

Post v. Mun, 1 South's N. Jersey Rep. 61; cited
 in Angell's Tidal Rivers, 81;
 where a ship was held not liable for injuring nets, no
 wanton negligence being proved.

As to the law in England having been such, even
 before Magna Charta,

Williams v. Wilcox, 8 Ad. & E. 333;

Hale's De Jure Maris, 22.

As to the consideration necessary to support a toll—

Bell, s. 654;

Pelham v. Pickersgill, 1 T. R. 669;

and distinguished,

Falmouth v. George, 5 Bing. 286.

As to the right of anchoring for convenience, he
 referred to a case cited 1 Camp. 517 note.

He distinguished the case of stallage and pickage as
 involving the use of private soil for purposes not
publici juris,

Mayor of Northampton v. Ward, Stra. 1238.

Lush, Q.C., Denman, Q.C., and Neeldham, for the
 respondents, after urging that the question was, what
 could be claimed by prescription, and not what could
 now be granted by the Crown, and that the case was
 not to be determined by the rights of the Crown as
 now defined, and after pointing out that the finding of
 the jury was in effect that the custom was immemorial,
 argued—

1st. That the Crown, before Magna Charta, could
 have made a grant of the soil of an estuary, and that,
 therefore, it could be now claimed by a subject by
 prescription,

Hale, De Jure Maris, 31.

2nd. That the right of navigation merely involved
 the right of free passage,

Hale, De Jure Maris, 36,

not that of anchoring, and that no case went so far
 as that.

3rd. That the respondents made no claim for
 anchoring in stress of weather, but only for voluntary
 anchoring.

4th. That anchorage might be taken by the owner
 of the soil by virtue of such ownership, though he

was not the owner of the harbour, and though the
 ship derived no benefit from the harbour, and that
 such right would not necessarily be confined within
 the limits of the harbour.

5th. That no particular consideration was necessary,
 and that such a general consideration as the main-
 tenance of the fishery would support the toll.

Prentice, in reply.

3 MARCH, 1865.

THE LORD CHANCELLOR, after stating the nature of
 the question at issue, and observing that it was
 admitted, in effect, that the respondents' claim had
 been made from time immemorial, and that the appel-
 lant's anchor had been cast within the limits of the
 respondents' fishery, said, that the question appeared
 to him to depend upon principles which had been
 long settled. The bed of all navigable rivers, where
 the tide flowed and re-flowed, and of all estuaries and
 arms of the sea, was undoubtedly vested in the Crown,
 but such ownership was so vested for the benefit of
 the subject, and so as not to derogate from or interfere
 with the subject's right of free navigation. The right
 of anchoring was a necessary part of the right of
 navigation. If the Crown were to make any grant of
 the soil of an estuary or navigable river, it could
 only make such grant subject to the public right of
 navigation; no one could make any claim by virtue
 of such a grant as would in any way interfere with
 that right, even if it had been expressly granted to
 him. The respondents laid claim to a portion of the
 soil below low-water mark, and, as incidental thereto,
 claimed to levy a toll which would interfere with the
 enjoyment of that right of free navigation, subject to
 which their original grant must have been made. The
 toll in question could not be supported by the mere
 ownership of the soil. If the claim had been to levy
 toll for anchoring within the limits of a port or
 harbour, or if some return had been offered in the
 shape of special advantages to navigation, in respect
 of which the toll was claimed, the respondents' claim
 might have been supported; but nothing of the kind
 appeared. His Lordship could not suppose that the
 establishment of oyster-beds for the private emolu-
 ment of individuals could be regarded by the law as
 an equivalent to the public for the imposition of a tax
 upon navigation, nor could such a return be inferred
 from the mere fact of the claim having been made
 from time immemorial; and, in fact, the claim was
 not based upon the grounds of any such return, or of
 the ownership of a port or harbour, but was merely
 insisted on as incidental to the ownership of a certain
 portion of the soil. Anterior to Magna Charta a
 several fishery in the open sea might have been
 granted by the Crown to a subject, and such grant
 might have included a portion of the soil as a neces-
 sary or convenient incident to the fishery, but such
 grant must have been made subject to the public right
 of navigation. His Lordship then referred to the

judgment in *Mayor of Colchester v. Brooks* (*loc. cit.*), and commented on the judgment of the Court below, and said that, with all deference to the opinions of the learned Judges below, they appeared to him to have fallen into error through not seeing that any grant of the soil must have been made subject to that right of navigation to which anchoring is incident. There was no warrant for assuming that any gift was here made to the public in return for the toll. His Lordship thought that a new trial was unnecessary, and that the judgment of the Court below must be reversed.

LORD WENSLEYDALE expressed some dissatisfaction at the manner in which the case had been stated, and said, that his own impression had been in favour of further inquiry, and that with that object he had wished that a new trial should be directed. It appeared to him that it was quite possible consistently with the allegations on the record, that there might be a consideration sufficient to support the toll. The payment was proved to have been made for nearly ninety years—every presumption was in favour of its having been made from time immemorial. It was not possible to hold that the Crown could make a grant of an arm of the sea so as to deprive the subject of his right of anchorage without some evidence of a compensation in return. There was no sufficient evidence of such compensation in the facts stated on the record, thought it was quite possible, consistently with what was stated, that there might have been some. It was unfortunate that the strict rules of pleading applicable to proceedings by way of a bill of exceptions had given way to the loose statements of facts admissible in a special case. His Lordship, after going through the facts of the case, remarked that the case did not state exactly where the anchor was cast, nor whether the anchor had been cast under stress of weather or not, but that it was unnecessary to decide whether the vessel was in peril or not, as even if the grant under which the respondents claimed, was rightly presumed to date before Magna Charta, yet that grant must be taken to be subject to the right of navigation, unless some consideration for the toll could be shown to be given to the public. It might be that the establishment and maintenance of the fishery might justify the toll. His Lordship, after referring to the directions of Coltman, J., in *Mayor of Colchester v. Brooks* (*loc. cit.*), said that, though he had thought that on the pleadings there might have been some consideration, yet, as the other noble Lords thought, that on the admissions it was established that there was no sufficient consideration, he would yield to their opinion.

LORD CHELMSFORD said, that the principal question was, whether the respondents, as owners of the fishery, were entitled to demand a toll from the appellant for having cast anchor within the limits of their fishery, their title to such payment being derived from the lords of the manor. The special case

did not state whether the claim applied to all vessels whether driven to anchor by necessity or not, nor was it stated whether the soil actually belonged to the respondents or not, but only that it was claimed by them. The counsel, however, on both sides wished to have the question decided, whether the claim could have a lawful origin or not. As to the claim being made in respect of anchoring within a port, because the ground in question was within the limits of the harbour of Faversham, that point had not been raised in the Court below, and could not be maintained, as the respondents were not owners of the harbour, and the anchorage due was not in fact claimed in respect of a port.

The question simply was, Whether, at any time, the Crown could have imposed on a subject a toll for anchoring within the limits of the Crown's ownership, without offering any other consideration, except the mere use of the soil for that purpose? Chief-Justice Erle, in the Court below, had said, "The soil under the sea is vested in the Crown, to the extent of three miles from the shore; and if such soil had been granted by the Crown, it might well be that the right to take one shilling for anchorage toll for the use of such soil, might have been granted also." But it was not to be assumed as unquestionable, that the bed of the sea was to such an extent the property of the Crown, as to justify the Crown in levying toll for casting anchor therein. The ownership of the Crown, according to the text writers, only extended to the soil between high- and low-water mark: the doctrine that the Crown was possessed of the soil to the extent of three miles out to sea, was merely a principle of international law. The question was, Whether, even within the limits of low-water mark, the Crown's ownership of the soil would justify such a toll? The Court below admitted that there was a paramount right of navigation in the sea, in the arms of the sea, and in navigable rivers. If so, it was not easy to see how the public could be made to pay for the exercise of that right. The respondents, therefore, were driven to say, either that they gave some special consideration in return for the toll, or that anchoring was not a necessary incident to the right of navigation.

It was contended, that the use of the ground was a sufficient consideration; but that was not so. Anchorage was always claimed in respect of a harbour, as clearly appeared from the passages of Lord Hale's works which had been cited, and in respect of a haven only where it was within the limits of a port. Mr. Justice Williams had quoted a passage from Lord Hale, p. 73 (31 L. J. C. P. 380), as establishing, that if a subject had a royal grant, he might take a toll; but his Lordship could not agree with that construction of the passage in question: he thought it only established, that without a grant a subject could not have a harbour, and that without a harbour, there could be no anchorage. The necessity of finding some *quid pro quo* to support the toll, had driven the res-

pondents to say, that the maintenance of the fishery was a sufficient consideration; but his Lordship thought that a benefit so vague, and so wholly unconnected with navigation, could not support a local payment. It was the undoubted right of the public to navigate the sea without making any payment, except in respect of some special consideration, which the use of the soil was not, unless anchoring was not to be considered as incident to navigation, which could hardly be contended.

Minute.—Judgment reversed.

House of Lords.

30 MAY, 3 JUNE, 1864.

5 MARCH, 1865.

} ATTORNEY-GENERAL v.
LORD SEFTON.

Present—THE LORD CHANCELLOR, LORD WENSLEYDALE, and LORD CHELMSFORD.

Succession Duty—16 & 17 Vict. c. 51, ss. 2, 10, 20, 21—*Real Estate*—*Time at which the Value of the Property must be calculated*—*“Annual Value”*—*Land at Time of Succession Unproductive and of No Marketable Value*—*Subsequent Sale as Building Land.*

S succeeded to certain lands adjoining a large town, which were waste and unproductive. It was admitted by the Crown, that at the time of the succession, the property could neither be let nor sold. Subsequently it became valuable as building land, and was sold as such, when the Crown made a claim to succession duty on such value:—

Held, affirming the judgment of the Court below, that such claim could not be sustained, inasmuch as the duty must be calculated with reference to the value of the property at the time of the death, and not with reference to any future or prospective value.

Quære, Whether, in cases where land does not yield any actual annual income, but has a saleable value, succession duty may be assessed upon the amount which it would fetch, if sold at the time of the death.

This was an appeal from a judgment of the Court of Exchequer upon an information in Equity by the Crown, to recover succession duty from the respondent in respect of certain lands left to him by his father's will.

The case is reported, 2 Hurlst. & C. 362, and 3 N. R. 45.

The material facts were as follows—

Upon the death of the late Earl of Sefton, in August, 1855, and under the disposition made by his will, the respondent became entitled to certain real property, in respect of the greater part of which he admitted he was liable to pay, and actually did pay succession duty as upon a succession derived from his father, but in respect of the residue of such real property, consisting of certain plots of land near Liverpool, he declined

to pay any succession duty, on the ground that at the time of the death of his father, and of his becoming entitled, the land in question was wholly unproductive and valueless. Some discussion took place between the respondent and the Commissioners of Inland Revenue with reference to this land, and ultimately the respondent delivered to the Commissioners an account for assessment, which was accompanied by a notice in the following terms—

“2nd of April, 1857.

“I hereby give you notice that the several plots of land specified in the schedule (E) hereto annexed, forming a part of the Tooteth Park Estate, devised to me by the will of the late Charles William Earl of Sefton, deceased, are not comprised in the return this day made by me pursuant to the Succession Duty Act, 1853, inasmuch as the same plots of land being wholly unoccupied and unproductive, and not capable of yielding income fluctuating or otherwise, I am advised that no succession duty is or will be payable thereon.

“SEFTON.

“To the Commissioners of Inland Revenue.”

After receiving this notice, Mr. Trevor, the Comptroller of Succession Duties, wrote and sent to the defendant a letter in the following terms—

“Inland Revenue, April 6th, 1857.

“My Lord,—I have the honour to acknowledge the receipt of your Lordship's notice, dated the 2nd instant, relative to your succession upon the death of the late Earl of Sefton to 48,272 square yards of land. This land not at present yielding any income, has not been noticed in the assessment made on the 3rd instant of the amount of succession duty payable by your Lordship. But if after any interval from the late Earl's death, you should derive income or profit from this land, I beg to observe, that your Lordship will be expected to deliver a further account in order that succession duty may then be calculated according to such value thereof.”

No answer was sent to this letter, but in April, 1862, the respondent's solicitors sent to Mr. Trevor a letter, stating that they thought it right to inform him that part of the land specified in Schedule E had been sold for 16s. the yard; but stating further that they had been advised that no succession duty was payable in respect thereof, and that they should decline to pay any.

The information stated that it was alleged by the respondent, and not disputed by the Attorney-General, that at the time of the death of the respondent's father, and of his becoming entitled to the land in question, “the same was not in demand or marketable as building land, nor was it capable of being sold let profitably as such, and that the custom in Liverpool was for the owner of land which was building land to sell it absolutely for building on, and not to let it upon long leases or otherwise for building; and

that the said land was not, at the time of the respondent's becoming entitled thereto, capable of being used productively for agricultural or other purposes, and that such land was then, and had been for ten years previously, and (except that portion thereof which had been sold, as before stated), had ever since been wholly unoccupied and unproductive, and that during no part of that time had any income or annual profit been derived from it." And that "the portion thereof which had been sold as before stated, had ever since the respondent's becoming entitled thereto, up to the times when the same was sold, been wholly unoccupied and unproductive, and that during no part of that time had any income or annual profit been derived from such portion."

The case was argued in Trinity vacation, 1863, when the Court was divided in opinion: Mr. Baron Martin being in favour of the claim of the Crown, and Mr. Baron Wilde and the Lord Chief Baron against it.

The Attorney-General, The Solicitor-General, and Hanson, for the Crown.

1st. All property is made subject to duty by the Act. The sections here applicable are the 2nd, 10th, and 20th. It lies upon the respondent to show that their effect is done away with by other sections. The Court below relied upon the 21st section, and the words there "annual value," but those words have reference only to the *measure of value*, and do not require that the property should be capable of producing immediate income,

Re Elues, 3 H. & N. 719—724.

The tax is essentially a tax on capital, not on income; the reference to annual value is only for the convenience of the land, and in order not to impoverish it by reason of the series of successions which it must go through. The proper mode of ascertaining the amount of the tax on land is to capitalise the succession, and then tax the successor on the value of an annuity equal to the interest at 3l. per cent. on such capital sum.

With regard to corporations, the principle is different, (section 27,) because there, there can be no series of successions.

[THE LORD CHANCELLOR.—Ought not Lord Sefton to have made a return under the 45th section?]

Either he ought to have made a return then, or he ought to pay on what is now ascertained to be the value of the land.

The sections of exception, which are the 23rd, 24th, 25th, and 26th, do not take the cases not specially excepted by them out of the operation of the general taxing clause.

2nd. If none of the taxing clauses apply in terms to this case, at all events they furnish a rule by analogy.

Sir Hugh Cairns, Q. C., Mellish, Q. C., and Crompton Hutton, for the respondent.

1st. The value of a succession for the purposes of

the Act must be ascertained at the time of the death upon which it accrues—it is not intended that there should be any repetition of the process of valuation.

2nd. There are successions in respect of which there is no duty—as unopened mines.

3rd. The principle of the Act is, that for the purposes of ascertaining the value of a succession, you must deal with the property as you find it at the time the interest accrues. We do not say that if an owner does not choose to cultivate or let his land, there will be no duty payable, but if there be property which, according to the actual mode of enjoyment, produces nothing, it is not to be taxed because by using it in a different manner it might be made to produce income. The Lord Chief Baron put the case of a mansion and park; so with a lake, which if drained, might be let, or a barren rock with a valuable mine under it, or foreshore covered with the sea.

If the property was wholly unproductive at the time of the death, how could it form any part of the succession? A succession in the Act means "property chargeable with duty." But this property, at the time of the death of the late Earl, had no annual value, and, therefore, was not chargeable with duty,—and could not subsequently become a succession when it acquired some annual value.

The Attorney-General in reply.

3 MARCH, 1865.

THE LORD CHANCELLOR, said: Two questions arose in this appeal,—first, what was the subject of taxation in a succession, and, secondly, at what time the subject was to be ascertained and assessed. For this inquiry, the material sections of the Succession Duty Act appeared to be the 10th and the 21st. The 10th section was the taxing clause, and it imposed duties according to the value of the succession, which value was ascertained by the machinery of the 21st section. By the latter section it was declared that the interest of a successor in real property, with certain exceptions, should be considered to be of the value of an annuity equal to the annual value of such property—that was, of the property, the interest in which constituted the succession—after making certain allowances; and the questions which arose were, what was meant by annual value, and at what time such annual value should be ascertained. Were the words "annual value" satisfied by taking the actual yearly value of the property in its existing state and manner of enjoyment, or the value it would yield if applied and enjoyed in a different manner, and was the annual value to be ascertained at the time of the accrual of the succession, or would it include any future value which it was certain or probable that the property would have within a short period of time. Upon these questions, his Lordship thought it clear that the value must be ascertained at the time of the accrual of the succession, and where the property was at that time yielding or capable of

yielding annual income, he agreed with the Lord Chief Baron and with Mr. Baron Wilde that the full, present, actual yearly value of the property in its existing state or mode of enjoyment was the subject of assessment. He concurred with Mr. Baron Wilde in thinking that no system of assessment or charge could be adopted which drew into the calculations of value a prospective or future benefit which was uncertain as to the time of its incidence. But there might be successions which, at the time of accrual, neither yielded nor were capable of yielding in their existing state any annual income, but which were saleable, and would fetch in the market considerable sums; and in such cases he should be inclined to think, although the point did not then require decision, that the property which formed the succession, not being exempted from the operation of the Act, which was the case with unopened mines, timber, and advowsons, had an annual value within the meaning of the Act,—namely, a value equal to interest at 5 $\frac{1}{2}$ per cent. on the sum that might have been realised if the property had been sold at the time of the accruing of the succession, and that the successor could not baffle the statute by postponing a sale until a future period. Such might have been the course adopted in the present case, for it was impossible to suppose that land which sold for a large sum of money within a few months after the accrual of the succession, would not have yielded something if sold at the time of the succession. But this course was not taken, and the present appeal must be decided on the facts which were clearly admitted by the Crown. For if the property had not at the time when the interest of the successor accrued any saleable value, or any actual or potential annual value, it was clear that it was not capable of being assessed, and that it was not a succession, which word was defined to mean property chargeable with duty under the Act. And this was, as between the parties before the House, the condition of the property in question. The information admitted that at the time of the death of the respondent's father, and of his becoming entitled to the land, the same was not in demand or marketable as building land, neither was it capable of being sold or let profitably as such. Then the word "profitably" was explained by the subsequent allegation that the land was not at the time of the respondent's becoming entitled to it capable of being used profitably for agricultural or other purposes, and that such land was then, and had been for ten years previously, and had ever since been, wholly unoccupied and unproductive, and that during no part of that time had any income or any profit been derived from it. Upon those admissions he was of opinion that the property, the respondent's interest in which was alleged to be a succession, had no assessable value at the time of his becoming entitled, and that the Crown was not entitled to any duty. He should, therefore, move their Lordships that the appeal of the Crown should be dismissed with costs.

LORD WENSLEYDALE said: At first sight he had entertained some doubts as to the exact point raised upon the pleadings, but, on consideration, he had become satisfied that it was meant to be stated, as admitted, that the land at the time of the death of the late Earl had no annual value, that it yielded no rent, and could not with reasonable care be made to yield any. He did not think that there was, in fact, any succession for value during the first seven years after the death. If the property had at the time of the death no annual value whatever, then there was no basis for calculation. If the property subsequently acquired a value by the industry of the successor, that increase was not a succession derived from the predecessor, and if the property increased in value through accidental circumstances, that case could not be held to have been within the contemplation of the Act. His Lordship then referred with approbation to the judgment below of Mr. Baron Wilde, agreeing with him that the succession was to be calculated with reference to the annual value, and not to the gross value of the corpus of the property. Mr. Baron Martin thought it could not have been the deliberate intention of the Legislature to relieve from duty such land as that in question; but the answer was, that the subject could not be touched without clear words of taxation. He was satisfied that the annual value only was taxed, and that there was no other time but the first year after the death when that value was to be ascertained. The eight half-yearly instalments of duty could not be dated from any future period. If there was no annual value at the time of the death, there could be no duty. If the property rose in value, the Crown would get the benefit of that on future successions. He did not think that it was open to the Crown to go into calculations as to the property being saleable, or the value it might realise upon a sale, as the only criterion given by the Act was the annual value.

LORD CHELMSFORD, after referring to the admissions made by the Crown, and to the letter from the Inland Revenue Board of the 6th of April, 1857, said: The Board were in error in supposing that they might make a claim in respect of future value. The value of the succession must be determined at the falling in of the succession, and not at any other time. If the property was then valueless, it was not to be left to become liable to duty on the contingency of its becoming valuable at some future period. The Crown could no more claim duty in respect of a future increase of value in the property, than the subject could claim a return of duty by reason of a decrease in value. He thought the 20th section placed it beyond doubt, that the value of the succession must be determined at the time when it fell in, and that if it had no value then, it could not be made subject to duty either then or at any future time. There was no authority in any of the sections for any future valuation, not in the 37th section, which only referred

to the case of one being kept out of part of his property, nor in the 39th section, which was wholly inapplicable, as the land had been ascertained to be worthless. It had been contended that the property might have fetched something upon a sale, and that if it had a saleable value it might have been assessed upon that value. The 23rd and 24th sections rather favoured that view: but the Crown had admitted that it had no saleable value then, which being the case, it was not assessable then; and not being so, it could not become assessable afterwards.

Minute.—Appeal dismissed with costs.

Lord Chancellor. } *Re SKERG'S TRUSTS.*
4 MARCH, 1865.

Practice—Petition of Appeal—Signature of one Counsel.

Leave will be given to present a petition of appeal signed by one counsel only, where the subject-matter of litigation is of small value, and the case has been argued by one counsel only on each side in the Court below.

F. H. Colt, applied for leave to present a petition of appeal signed by one counsel only, stating that the value of the subject of litigation was 300*l.*, and that the case had been argued by one counsel only in the Court below.

THE LORD CHANCELLOR said, that it was very unsatisfactory to deviate from the order requiring the signatures of two counsel, but he had found a decision of the Court of Appeal, allowing a petition of appeal to be presented with the signature of one counsel, where one counsel only had been employed on each side in the Court below. This seemed reasonable, and he would give leave in the present case.

Babington made a similar application in another case, to which

THE LORD CHANCELLOR also acceded.

Master of the Rolls. } *WILLIS v. WILLIS.*
21 FEB., 6 MARCH, 1865.

Freebench—Settlement—Equitable Jointure.

An ante-nuptial settlement upon a wife of copyholds "in order to make some provision for her in case she should survive her husband":—

Held, not to bar her right of freebench out of other copyholds.

Distinction between dower, previous to the Dower Act, and freebench.

Birmingham v. Kirwan, 2 Sch. & Lef. 444, approved and followed.

This was a special case. The question was, whether the settlement made on the defendant at her marriage

barred her right to freebench out of the unsettled copyhold estates of her husband.

The defendant being a spinster, married in October, 1854, and her husband died in March, 1863, intestate. There was no issue of the marriage, and the plaintiff was the husband's heir-at-law and customary heir.

By an ante-nuptial settlement, the husband, "in order to make some provision for the said Harriet Tell" (the defendant), "in case she should survive her said intended husband," covenanted to surrender to the trustees of the settlement certain copyhold hereditaments, which he held of the manor of Wargrave in the county of Berks, to the trustees of the settlement, to the use of the husband for life without impeachment of waste, with remainder to the use of the wife for life without impeachment of waste, with remainder to the use of the husband in fee. There was no provision for any issue of the marriage.

The husband at the time of the settlement, and also at the date of his death, held some other copyhold hereditaments of the same manor, the annual income from which was 20*l.* at the date of the settlement, and 24*l.* at present. The income from the settled property was 40*l.* per annum.

The custom of the manor of Wargrave was stated to be that "a woman, not being a widow before her marriage with a copyholder of the manor, after the decease of her husband being a copyholder, may hold the copyhold lands which were her husband's so long as she keepeth herself sole and chaste."

F. Waller, for the plaintiff, contended that the provision for the widow was intended to bar her right to freebench. That provision was a better one, for it was absolute and not defeasible on second marriage. The remaining copyholds might have been intended as a provision for the issue. Similar words had barred the right, as to dower, in,

Vizard v. Longdale (cited in *Tinney v. Tinney*, 3 Atk. 8); (*sub nomine Vizard v. London*) *Kelynge*, 17;

Power v. Sheil, 1 Molloy, 296;

Garthshore v. Chalie, 10 Ves. 1;

Hamilton v. Jackson, 2 J. & L. 295;

Dyke v. Rendall, 2 De G. M. & G. 209.

Casson, for the defendant, contended that the words in the cases cited were much stronger than in the present case. A general provision, such as these words express, had not excluded the widow's right to dower,

Tinney v. Tinney (*loc. cit.*);

Couch v. Stratton, 4 Ves. 391.

If any doubt arose on the contract whether the widow had agreed to accept the provision as a jointure and in bar of freebench, her legal right continued,

Hamilton v. Jackson, 2 J. & L. 295, 299;

Birmingham v. Kirwan, 2 Sch. & Lef. 444, 452.

In the present case all that was clear was, that the husband intended to make some certain provision for his wife, which should not be defeated during his life.

F. Waller, in reply.

There was a plain intention, at the date of the settlement, that the two estates should be dealt with separately.

THE MASTER OF THE ROLLS said, that it had been argued that such a covenant as the one in question would be sufficient to operate in bar of dower. It was settled by *Garthshore v. Chalie* (*loc. cit.*), *Hamilton v. Jackson* (*loc. cit.*), *Dyke v. Rendall* (*loc. cit.*), and other cases, that the settlement of a jointure made before marriage would bar dower; and many cases had been cited to show that when a provision for a wife was stated to be "for her livelihood and maintenance," it would bar her right to dower. This, however, was an inference to be drawn from the provision, and it was important to bear in mind this distinction between dower and freebench, — namely, that before the Dower Act (3 & 4 Will. 4, c. 105) the husband could not sell, free of dower, land on which the right to dower had once attached, whilst the wife had no incipient right to freebench, but was entitled thereto only in the event of the husband dying seised of copyholds.

In the settlement in question, his Honour could find no intention that the wife's right to freebench should be barred; no such intention was expressed in the settlement, and no implication to that effect could be drawn. The husband could have barred the right of his wife by a surrender, and he could not be supposed to have made the settlement in order to acquire a greater power of inheritance. The object of the settlement was only to restrain the husband from aliening the copyholds which were settled, but leaving him at liberty to alien the other copyholds. The husband dying intestate, and without having aliened these other copyholds, the settlement was no bar to the wife's right of freebench out of them.

This was illustrated by the case of *Birmingham v. Kirwan* (*loc. cit.*), where a testator gave a house to his wife for her life, with a direction that she should pay yearly a sum of money to keep it in repair; and Lord Redesdale held this disposition to be inconsistent with the claim of dower out of the house, but to be no bar of dower out of the rest of the estate.

In the present case the intestate might have deprived the widow of her right by disposing of the copyholds in question, expressing that they were not to be subject to freebench; as it was, the widow was entitled to the provision which had been made for her, and also to her right of freebench out of the copyholds which had not been settled.

Master of the Rolls. } D'HUART v. HARKNESS.
27 FEB. 1865.

Power—Execution—Foreign Will.

A foreign will may be a valid execution of a power exercisable by will, in respect to personality.

Anne Eliot bequeathed certain bank annuities to trustees in trust for her daughter, the Baroness d'Huart, for life, and after her decease "in trust for such person or persons, and for such intents and purposes, and in such parts, shares and proportions, manner and form, as her said daughter, by her last will and testament in writing, duly executed, or any codicil thereto, should, notwithstanding coverture, direct and appoint."

The Baroness d'Huart became thereby entitled to dispose by will of a sum of 2,205*l.* 11*s.* 4*d.*, 3*l.* per cent. Consolidated Bank Annuities, and she bequeathed that sum to her husband, the plaintiff.

The Baron and Baroness were domiciled in France, and her will was all in her own handwriting, in the French form, and language, and not attested by any witnesses. Such a will is valid according to the law of France, and after the death of the Baroness probate of the will was granted to the plaintiff in her Majesty's Court of Probate.

The bill prayed a declaration that the will of the plaintiff's late wife might be declared to be a valid execution of the power of appointment given to her by the will of her mother, Anne Eliot.

Hobhouse, Q.C., and *Busk*, for the plaintiff, cited,
Tatnall v. Hankey, 2 Moo. P. C. C. 342;
Re Alexander, 29 L. J. 91.

Selwyn, Q.C., and *Homersham Cox*, for the persons entitled in default of appointment, contended that only a will executed in accordance with the Statute of Wills, was a valid execution of the power,

1 Jarman on Wills, 4;
1 Sugden on Powers, 208 (7th ed.);
Thornton v. Curling, 8 Sim. 310.

THE MASTER OF THE ROLLS, without calling for a reply, said: The fact of probate being granted only proved that the instrument was such a will as was recognised in this country; but the English law admitted of two classes of wills: first those made in accordance with the Statute of Wills; and, secondly, those made by persons domiciled in a foreign country according to the law of that country. Where persons used the words "by will," they must be understood to mean a will recognised in this country. The cases cited meant only that a power might be executed by a will made in accordance with the Statute of Wills, though not in accordance with the laws of the country of domicile. The law allowed the power to be executed in either manner. In the present case, the word "duly," added nothing to the meaning; and it must be held that the sum passed to the plaintiff.

Master of the Rolls. } **HEYWOOD v. HEYWOOD.**
27 FEB., 7 MARCH, 1865.

Settlement—Ultimate Limitation—3 & 4
Will. 4, c. 106, s. 3.

3 & 4 Will. 4, c. 106, s. 3, does not apply to the ultimate limitation in a marriage settlement by a woman to the persons who would have been entitled if she had died intestate, and without having been married.

By the marriage settlement, made subsequent to the 31st of December, 1833, of the Baron and Baroness d'Huart, the Baroness, being seised of an estate as heiress, through her mother, of Serjeant Heywood, conveyed the same to trustees on trust for herself and her heirs till the marriage, then upon trust for herself for life for her separate use, without power of anticipation, and then for the children of the marriage and their heirs equally; but in case of failure of issue, then, after her decease and such failure of issue, for herself and her heirs, in case she should survive her husband. And the limitation continued,—but if she should die in his life-time, then, from and after her decease and such failure of issue, on trust for the persons who would on her decease have become entitled to the premises, in case she should have died intestate, and without having been married.

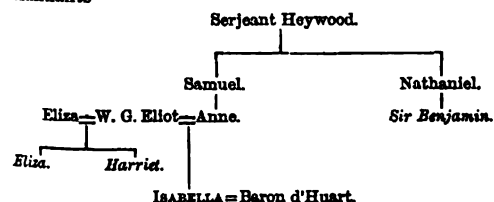
There was no issue of the marriage, and the Baroness died, leaving her husband surviving.

The plaintiff, Sir Benjamin Heywood, was a grandson of Serjeant Heywood, and the Baroness' heir *ex parte maternâ*.

Two half-sisters of the Baroness were her heiresses, *ex parte paternâ*.

The bill prayed a declaration, that the plaintiff was entitled to the estate.

The following table shows the pedigree of the claimants—



The Attorney-General and T. Stevens, for the plaintiff, contended that the persons designated by the ultimate limitation were the heirs *ex parte maternâ*.

They cited,

Holliday v. Overton, 15 Beav. 480.

Selwyn, Q.C., and *Homersham Cox*, for the half-sisters of the Baroness, contended that the persons designated were the heirs *ex parte paternâ*,

3 & 4 Will. 4, c. 106, s. 3.

Hinde Palmer, Q.C., and *Higgins*, for the trustees.

The Attorney-General, in reply.

7 MARCH, 1865.

THE MASTER OF THE ROLLS said: The only words in the statute which applied to this question, were those in the latter part of the third section, "Where any land shall have been limited by any assurance, executed after the said 31st day of December, 1833, to the person, or the heirs of the person, who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as of his former estate, or part thereof."

Now the estate was, if the Baroness had died before marriage, limited by the settlement to her and her heirs; so also if she had survived her husband. It is quite clear that if either of these events had happened, she would have taken the estate as purchaser, and her heir *ex parte paternâ* would have taken; but neither of these events had happened.

The question was, who took under the limitation to the "persons who would on her decease have been entitled, in case she should have died intestate, and without having been married"? Now, in the first place, this was not a limitation to her and the heirs of her body, and if the persons to take under this limitation took as purchasers, it was clear the words of the third section did not apply. That section applied only to the case where the estate was limited to the heirs of the person who conveyed the land. In such a case the statute merely altered the nature of the estate, so that the person who conveyed took under the ultimate limitation. Here the Baroness, who conveyed, took no estate, but it was taken by persons who took as purchasers under the settlement, and not by descent; namely, the persons who at the death of the lady would have become entitled, "in case she should have died intestate, and without having been married." He thought these words referred to the persons who would have taken if the settlement had not been executed. According to this construction, the plaintiff was the heir of the Serjeant and of the Baroness, and was entitled.

Stuart, V.-C.

28 FEB.,

1, 3, 4, 6, 7 MARCH, 1865. } **BAYLEY v. WILLIAMS.**

Mortgage—Duress—Want of Consideration—
Compounding Felony.

Security obtained from the plaintiff by the defendants under the pressure of a threat, or the fear, that they would prosecute his son for forgery, set aside.

This suit was instituted for the purpose of setting aside three agreements for mortgage and a deposit of title-deeds, all of which the plaintiff asserted to have

been extorted from him by a threat that the defendants would prosecute his son for forging the plaintiff's indorsement to promissory notes, to the amount of more than 7000*l.*, of which the defendants were holders.

The defendants are bankers at Wednesbury, and the plaintiff and his son, William Bayley, who carried on separate trades, were in the habit of discounting bills and notes with them. The defendants endeavoured to prove, but failed in satisfying the Court, that the plaintiff had been in the habit of allowing his son to use his name in bill transactions.

In the month of April, 1863, however, the defendants held promissory notes, indorsed with the plaintiff's name, to the amount of more than 7000*l.*; and on the 17th of that month, Mr. Deakin, the manager of the bank, saw the plaintiff, and made some inquiry respecting one of these notes. The plaintiff denied all knowledge of the notes: and, the same evening, the son confessed to his father that they were forged.

The parties met at the bank on the 20th of April, attended by their solicitors, Mr. Duignan and Mr. Thursfield. The evidence, as to the terms of the conversation was very conflicting; but the effect of it was, as appears below in the Vice-Chancellor's judgment, that the criminality of William Bayley was assumed, and that the plaintiff, in spite of the remonstrances of his solicitor, Mr. Duignan, was ultimately induced to sign an agreement to give security for the payment of the notes.

On the 22nd, a new agreement, in different terms, was substituted for the first, and subsequently a third agreement was added, in order to cover a note which had been omitted. The plaintiff deposited the title-deeds of some property at Tipton, to secure the amount. The arrangement was carried out by Mr. Thursfield the defendants' solicitor, Mr. Duignan having refused to have anything to do with the matter; but, within two or three days after its completion, the plaintiff again saw Mr. Duignan, and on his advice repudiated his engagements, and filed this bill to obtain back the three agreements and deeds.

The defendants, by their answer, ignored the forgery, and denied that they had ever admitted it, or that the arrangement had been in any way founded upon it. They also endeavoured to show that the plaintiff had received, and neglected, notice of dishonour of many of the forged notes;—but the Vice-Chancellor, as will be seen, did not consider the evidence on this point to be sufficient.

Malins, Q. C., and Everitt, for the plaintiff.

The consideration for these agreements, was clearly an illegal one,

Collins v. Blomfield, 1 Smith's L. C. 163;

Dyer v. Timewell, 2 Vern. 122, 123;

Ex parte Critchley, 3 Dowl. & L. 527;

Keir v. Leeman, 9 Q. B. (N. S.) 371.

Addison on Contracts, p. 892 (5th ed.);

even if it be held not to amount to an express agreement to stifle a prosecution, but as tending only to interfere with public policy,

Evans v. Jones, 5 M. & W. 77;

Gilbert v. Sykes, 16 East, 150;

Egerton v. Lord Brownlow, 4 H. of L. Ca. 1, 163, 196;

Ex parte Elliott, 3 M. & Ayr. 110, 126, quoting

Stone v. Marsh, 6 B. & C. 551;

Hoginbotham v. Holme, 19 Ves. 88.

and the Court will intervene to set them aside, even at the instance of a person implicated in the illegality.

Jackman v. Mitchell, 13 Ves. 581;

Smith v. Cuff, 6 M. & S. 160;

Mars v. Sandford, 1 Giff. 283;

Wallace v. Hardacre, 1 Camp. 45;

Bosanguet v. Dashwood, Cas. temp. Talb. 37;

Osbaldiston v. Simpson, 13 Sim. 513;

Reynell v. Sprys, 1 De G. M. & G. 669;

Osborne v. Williams, 18 Ves. 379;

Chowen v. Baylis, 31 Beav. 351;

Sprys v. Porter, 7 El. & Bl. 58.

Even if any other consideration for the agreements could be alleged, besides the understanding that the defendants would not prosecute, yet the illegal consideration would invalidate the transaction,

Waite v. Jones, 1 Bing. N. C. 656;

Addison on Contracts, 904.

But no other consideration can be alleged, for the plaintiff was in no way liable on the bills, and the mere compromise of an unfounded claim upon him, if it had been made, would not support the agreement,

Wade v. Simeon, 2 M. G. & S. 548.

Apart from the positive illegality of the consideration, the Court will set aside a security given under a pressure which destroyed all equality between the parties,

Chesterfield v. Janssen, 2 Ves. sen. 125;

Huguenin v. Basley, 14 Ves. 273;

Dent v. Bennett, 4 My. & Cr. 269;

Claridge v. Hoare, 14 Ves. 59;

And the want of consideration is evidence of pressure,

Underhill v. Horwood, 10 Ves. 209;

Heathcote v. Paignon, 2 Bro. C. C. 167.

Sir Hugh Cairns, Q. C., E. K. Karlake, and Kingdon (of the Common Law Bar), for the defendants.

The evidence shows that the plaintiff had so conducted himself as to lead us to suppose that his son had authority to use his name, and he would be estopped at law from denying his civil liability to us on the bills,

Byles on Bills, 27 (7th ed.).

It was on this footing that the whole negotiation proceeded, and the plaintiff's object in giving the security was to put himself in the position of an immediate creditor of his insolvent son. He had the full advice of his solicitor, and deliberately acted against

The cases cited do not, therefore, apply. In nearly all of them, it appears that there was a distinct agreement not to prosecute. *Collins v. Blamers* (loc. cit.) was decided on a question of pleading. In *Wade v. Simeon* (loc. cit.), there was an averment which amounted to fraud.

A person holding a forged security is not estopped from taking a valid security before he brings the forger to justice,

Wallace v. Hardacre (loc. cit.);

and nothing short of an agreement not to prosecute, so distinct that, apart from the illegality, it could be enforced, will constitute an illegal transaction,

Ward v. Lloyd, 7 Sec. N. R. 499; 6 Man. & Gr. 785;

De Tastet v. Carroll, 2 Rose, 462;

Ex parte De Tastet, Mont. 138, 150, 163, 204, 206;

Dudley and West Bromwich Banking Company v. Spittle, 1 J. & H. 14;

Wickham v. Gatrill, 2 Sm. & Giff. 353;

Byles on Bills, 118 (7th ed.).

There is here a sufficient consideration,

Haigh v. Brooks, 10 Ad. & E. 309.

Malins, Q.C., in reply.

STUART, V.-C., said: This suit was instituted to set aside certain agreements dated the 20th and 22nd of April, 1863, on the ground that they were executed by the plaintiff under pressure, and in a transaction which amounted to compounding a felony committed by the plaintiff's son. If the fair result of the evidence showed that the agreements were executed under the influence felt by the plaintiff, and exercised by the defendants, of the fear of a criminal prosecution against the plaintiff's son; or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this Court, a security obtained under such circumstances could not stand. The inequality in the situations of the parties, —the one exacting a security which the other was driven to give, in order to save his son from exposure, disgrace and ruin, —tainted the security obtained under the influence of such fears. If the main and influencing purpose was the relief of the son from the consequences of his crime—if that was the main consideration operating in the father's mind, and was the origin and real cause of the transaction—the intervention of other circumstances, or other collateral advantages to the father, would not be enough to justify the Court in upholding such a security. The only question, therefore, in this case seemed to be, whether the defendants took advantage of the plaintiff's situation? The origin of the negotiation, which ended in the agreements, was the discovery that the plaintiff's name had been forged by his son on promissory notes,

of which the defendants were holders to a large amount.

There was nothing in the evidence on either side to show that the plaintiff was liable to pay the notes, or that the defendants were negotiating with him on the footing of his being under any legal liability to them. In the 93rd paragraph of the defendants' answer, they said, "No design whatever of instituting criminal proceedings against the said William Bayley was ever formed by us." But they added this remarkable statement, that "in fact the matter never reached a stage and point when it became necessary for us to intimate whether we would do so or not;" and in paragraph 74 of the answer, they said that Mr. Thursfield "did once, in the course of the discussion, say, 'it is a serious matter,'" and that Mr. Duignan immediately said, "It is a case of transportation for life." These significant words were followed by this insignificant explanation—"Mr. Thursfield had not said for whom, or in what respect it was a serious matter, and no remark was made upon the succeeding observation of the said Mr. Duignan, namely, that it was a case of transportation for life." In paragraph 35, the defendants said, "Mr. Deakin said that Messrs. Williams (meaning us) did not wish to exercise any pressure upon him (the plaintiff) if it could be satisfactorily arranged." It was a material circumstance that Mr. Duignan, when he found the plaintiff disposed to enter into the agreement and to assume the liability in order to relieve his son, remonstrated strongly, and finally, declining to sanction such a transaction, retired altogether. He left the plaintiff in the hands of the defendants and their solicitor, who then procured the plaintiff to execute the agreement of the 20th of April. Nor was it unimportant that that first agreement of the 20th of April, according to what appeared to be the truth of the case, contained nothing like an acknowledgment of any legal liability of the plaintiff. The second agreement, which was dated the 22nd of April, also signed by the plaintiff in the absence of his solicitor, was so framed as to make the plaintiff recognise the forged signatures as genuine; for it recited that the notes were endorsed by the plaintiff—a recital now admitted to be untrue, and contrary to the truth as understood by the parties at the time. The fair result of the evidence on both sides was given in the 20th paragraph of Mr. Duignan's affidavit, when he said, "The whole negotiations aforesaid proceeded upon the footing that the said notes were forgeries by the said William Bayley, for which he was liable to criminal prosecution, and I had not the slightest conception or suspicion during the whole of the interview aforesaid, that the defendants or Mr. Thursfield regarded the transaction in any other light." It was unnecessary to consider whether the offence of compounding a felony was committed or not. It was not the province of this Court to decide whether crimes or misdemeanors had been committed. If it were necessary to decide the question,

there would be great difficulty in holding that an agreement not to prosecute was not to be implied.

The real question was, whether there was that degree of equality between the parties to these agreements which was necessary to make them valid. Where a man was driven to comply with terms which were exacted through operating upon his fears, by the power, which the other parties made him see they had acquired, of using the power acquired of prosecuting, exposing, and disgracing his son, there was an inequality, and a want of that freedom of action which was necessary to the validity of an agreement. Where a power of operating upon a man's fears existed, and he entered into a contract unwillingly, and under the influence of that power, its existence constituted duress. The assent which was necessary to the validity of an agreement must be an assent uninfluenced by any power operating upon his fears of punishment, or of the disgrace which might be inflicted on the dearest object of his natural affection, at the instance of the person to whose power he yielded.

One argument adduced by the defendants, and which was founded on the allegation that the plaintiff had connived at the use of his name by his son, was not justified by the evidence. But even if the fact were proved, it seemed to have no material bearing on the question as to the validity of the agreements, and was not in any way an ingredient or actuating motive in this negotiation. The evidence showed that the greater part of the facts relied on as to that part of the case were discovered by the defendants long after the transaction, and did not seem to be of very material bearing on the real question before the Court. For the defendants an attempt had been made to show that the plaintiff's object was to gain a pecuniary benefit to himself by getting the entire dominion over his son's assets, so as to secure payment of a pre-existing debt to himself. That view of the transaction was contradicted by the evidence of what passed between the parties. The defendants' counsel had relied on a passage in Mr. Duignan's affidavit where he stated that the plaintiff said, "If you and Mr. Duignan can put me right with the creditors, so that I can come in as a creditor for the amount." But the antecedent and subsequent conversation of the parties, as described in the same paragraph, annihilated the argument, for that witness said that on his remonstrating with the plaintiff against his giving the proposed security the plaintiff replied, "What can I do? These men will have their money, and if I do not guarantee it, it is transportation."

There must be a decree declaring the invalidity of the two agreements, and ordering that they be delivered up to be cancelled, that the plaintiff's title-deeds be delivered up to him, and that the promissory notes be delivered back to the defendants, who must pay to the plaintiff the costs of the suit.

**Stuart, V.-C. } DOVER v. BUCK.
7 MARCH, 1865. }**

*Trustee—Creditors' Deed—Ultimate Trust—
Want of Interest in Subject of Suit.*

A plaintiff, assignor and ultimate cestui-que-trust under a deed of assignment for the benefit of creditors, filed a bill to set aside a sale by the trustee of the deed, as made at an undervalue; but did not prove, or even allege, that the true value, if realised, would have satisfied the creditors:—

Held, that he had not shown such an interest in the subject-matters of the suit as would entitle him to maintain it.

This was a cause instituted for the purpose of setting aside a sale by the trustee of a creditors' deed as fraudulently made to himself.

The plaintiff and his partners, in 1863, assigned their lease, machinery, and all their joint property, to the defendant Buck, on trust to sell and pay creditors, reserving, as usual, an ultimate trust for themselves. Buck sold the property to the defendant Wilkinson for 3,200*l.*, and afterwards bought it back for himself at the same price. The plaintiff complained of this transaction as fraudulent, but it was formally confirmed by a deed to which the plaintiff's former partners, and all his unsatisfied creditors (except one, who had refused an offer by the defendants to pay him in full,) were parties. These creditors were also defendants; they had received on the winding up of the trust only 13*s.* 4*d.* in the pound. The plaintiff alleged that the property had been sold at an undervalue, and in particular that an offer of 3,310*l.* for the property had been improperly refused.

The defendants by their answer denied fraud, and submitted that the plaintiff had not shown that he had any interest in the subject-matter of the suit.

Bacon, Q.C., and *Fry*, for the plaintiff, urged that the plaintiff, as a *cestui-que-trust*, had a positive right to inquire into the conduct of his trustee, and that the Court would not presume that, on a proper sale being made, there would be no surplus.

Malins, Q.C., and *Brodrick*, for the defendants Buck and Wilkinson, and *Babington* for the other defendants, were not called on.

STUART, V.-C., said: It was necessary for the maintenance of a suit that the plaintiff should show that he had an interest in the subject-matter of the suit; and, therefore, in the present case the plaintiff must allege, and prove, that he had a substantial interest in setting aside the sale. It might be assumed, for the present purpose, that Buck, the trustee, had purchased at an undervalue; and the bill alleged what the proper price would have been: a price far below the sum required in order to pay the creditors in full. The plaintiff had only an interest in

the surplus; and, on his own showing, there was no surplus. But, beyond that, the rule of Equity which invalidated a sale made by a trustee to himself was one which admitted of qualification, for such a sale was capable of confirmation; and not only so, but if the trustee acted fairly and openly, and with the concurrence of all the persons who had the primary interest in the property, the sale would be perfectly valid. The rule was not that the transaction was void, but that it might be undone, if a sufficient case were made out. In the present case all the persons really interested in the property had confirmed the sale.

It had been said that some of the creditors, who were not parties to the deed of assignment, remained unpaid; and that the plaintiff had an interest in seeing them paid, and so escaping the actions which they would bring against him. But from that danger the relief prayed by the bill would not protect him.

The bill must be dismissed, as filed by a person who had no *locus standi* in the matter; but it would be dismissed without costs.

Wood, V.-C.

30, 31 JAN., 3 MARCH, } KIRKWOOD v. THOMPSON.
1865.

Mortgagor and Mortgagee—Trustee for Sale.

The purchase by a second mortgagee, whose mortgage is under the form of a trust for sale, on a sale by a first mortgagee under a power of sale contained in his mortgage-deed is good as against the mortgagor.

Observations on the position of mortgagees whose mortgage-deed is under the form of a trust for sale.

On the 17th of January, 1846, Stephen Kirkwood made a mortgage in fee, with power of sale, of certain premises at Hull for 5,500*l.*, and interest to one Cash.

On the 16th of June, 1846, he made a mortgage in fee, with power of sale after notice, of other premises for 4000*l.* and interest, to Davidson and others the trustees of the National Provident Institution, and on the same day he further secured the 4000*l.* and interest by a mortgage in fee of the first-mentioned premises to the trustees of the National Provident, but subject to the mortgage to Cash, and with power of sale after notice, either subject to the mortgage to Cash or with his concurrence free from the same.

On the 25th of November, 1846, S. Kirkwood gave a bond to the defendants, Thompson & Carr, as trustees of the North of England Fire and Life Insurance Company, for the purpose of securing 1000*l.* and interest, which he had borrowed from that company, and the payment of the premiums on a policy on his own life, which he had effected with them, and on the same day he agreed in writing, with Thompson & Carr, that in case the interest on the

1000*l.*, or any premium, should remain unpaid for twenty-eight days after the day for payment, he would execute a proper mortgage to them of all the above-mentioned premises, subject only to the mortgage above-mentioned. The interest on the 1000*l.* having fallen into arrear, S. Kirkwood, by an indenture dated the 10th of December, 1847, conveyed all the above-mentioned premises to Thompson & Carr in fee, subject, as to the first-mentioned premises, to the mortgages to Cash, and Davidson and others, and as to the other premises, to the mortgage to Davidson and others, upon trust, without any further concurrence or consent of S. Kirkwood, his heirs, executors, administrators, or assigns, or any person or persons whomsoever, claiming or to claim, under him or them at any time or times thereafter, when Thompson & Carr should in their discretion think fit, to sell and absolutely dispose of those hereditaments and premises, and out of the proceeds of such sale to pay all costs and expenses, and the moneys and interest due to them, and all other incumbrances, and to pay over the surplus which should remain to S. Kirkwood, his executors, administrators, or assigns.

On the 7th of January, 1848, S. Kirkwood mortgaged the whole of the premises to Messrs. Pease.

S. Kirkwood died in 1848, having left a will; but, as the executors and trustees therein-named disclaimed, the will was not proved till the 10th of February, 1859, when administration, with the will annexed, was granted to the plaintiff, Mary Todd.

Soon after S. Kirkwood's death, default having been made in payment of the interest on the 1000*l.*, the North of England Company entered into possession of all the premises, and remained in possession, as mortgagees, till the time of the sales next mentioned, at which time the amount due on their mortgage was 1,294*l.*

In 1851, there being a large arrear of interest on their mortgage, the National Provident Institution put the premises up for sale by auction, under the power in their mortgage. Some of their premises were sold to persons not parties to the suit, the residue was sold, for 5,590*l.*, to the defendant Hall, acting as agent for the North of England Company. Shortly after the sale and conveyance to him, Hall executed a declaration of trust in favour of the company. The company remained in possession of the property purchased by Hall till the year 1858, when the company was dissolved, and its property was purchased by the Liverpool and London Company. The sum of 6,500*l.* (which was less by 384*l.* than the sum given by the North of England Company, together with what was due on their mortgage at the time of the purchase by Hall) was given for the premises, which were afterwards conveyed by Hall to Brocklebank and others, the trustees of the Liverpool and London Company.

The suit was instituted in March, 1864, by H. J. Kirkwood, the heir-at-law of S. Kirkwood, Mary

Todd, his administratrix, and her husband, against Thompson, Carr, Hall, and the trustees and public officer of the Liverpool and London Company.

The bill prayed for a redemption of the premises that had been conveyed to Hall, and for a declaration that he had been a trustee, and that since the conveyance to Brocklebank and others, they had been trustees for the plaintiffs.

The Liverpool and London Company set up the defence of being purchasers for value without notice.

Willcock, Q.C., T. A. Roberts, for the plaintiffs, distinguished a trust for sale from a power,

Parkinson v. Hambury, 1 Drew. & Sm. 143 ;

Shaw v. Bunny, 5 N. R. 260.

The North of England Company accepted a trust, and thereby became subject to all the duties of a trustee ; and as such they are unable to purchase,

Darcey v. Hall, 1 Vern. 43 ;

Morret v. Pasko, 2 Atk. 52 ;

Downes v. Gracebrook, 3 Mer. 200 ;

Ex parte James, 8 Ves. 348 ;

Re Bloyes' Trust, 1 Mac. & G. 488.

The duty of a mortgagee is quasi fiduciary,

Rushworth's Case, Free. Chy. 12 ;

Smith v. Chickester, 1 Con. & Law. 486.

The company was in possession before the sale to Hall, and remained so afterwards. There was no break in their possession. Where a person standing in a fiduciary relation obtains an advantage on the purchase of property, that advantage is for the benefit of his *cestuis-que-trusts*, although they may have little or no interest in the property,

Keech v. Sandford, 1 W. & T. L. C. 43.

Here, the neighbours were or might have been unwilling to bid against Hall, as Hall was interested in the property, and might have been bidding on behalf of the Kirkwood family ; and on this point the evidence of undervalue is important.

When the defendants on S. Kirkwood's death took possession, they must have done so as trustees, not as mortgagees.

The grounds on which the Court upsets a purchase by an agent for sale are not so much that the same person cannot be vendor and purchaser, as that he does not come into the market on equal terms with the public,

Ex parte James, 8 Ves. 337 ;

Ex parte Bennett, 10 Ves. 381 ;

Ex parte Hughes, 6 Ves. 617.

[WOOD, V.-C., here intimated that he was bound by the decision of the Lords Justices in

Shaw v. Bunny, 5 N. R. 260,

as to a purchase by a second mortgagee.]

Giffard, Q.C., and Kay, for defendants.

The deed of the 10th of December, 1847, was really a mortgage, though the trust for sale might be absolute in form. S. Kirkwood might at any time have filed a bill to redeem.

The rule was, that though a heir or an executor, if he bought in an incumbrance at a less sum than was due, could not charge more than he gave for it ; yet if the heir or executor had also a charge of his own on the property, he might insist on the full sum being paid. And the reason was clear ; for in the first case, it was only from his position as heir or executor that he could redeem.

The defendants could only become trustees if they executed the trust for sale.

Macnaghten, for the defendant Mr. Pease.

Willcock, Q.C., in reply.

3 MARCH, 1865.

WOOD, V.-C., said, that the question in the cause was, whether the plaintiffs could redeem as against the sale of the property to the North of England Company ? That in his opinion the North of England Company had not interfered in the conduct of the sale ; but that Hall must be taken to have purchased the property in question as their agent. That notwithstanding the serious doubts expressed by Turner, L.J., in the recent case of *Shaw v. Bunny*, whether a purchase by a mortgagee could be considered as standing on the same footing as a purchase by a stranger, he was of opinion that a second mortgage might, if the mortgagor did not redeem him, protect himself in every possible manner, either by buying in a prior mortgage, or by buying the property itself. That this opinion was confirmed not only by *Shaw v. Bunny*, and the other cases cited at the bar, but also by the cases of *Darcey v. Hall* (1 Vern. 49) ; *Dodson v. Laud* (8 Hare, 216) ; *Attorney-General v. Hardy* (1 Sim. (N. S.) 338) ; *Knight v. Marjoribanks* (2 Mac. & G. 12) ; *Davis v. Barrett* (14 Beav. 542). That the fact of the mortgagees being in this case trustees for sale, did not impair their right to protect themselves. They only became trustees when they were called upon to execute the trust. That the mortgagor could not have filed a bill against them to force them to sell under the trust, though if they had filed a bill it must have been for sale not foreclosure. It had been argued at the bar, that, as mortgagees in possession, they ought to have kept down the interest on the prior mortgage, and that an inquiry should be directed, why they had not done so,—but he could not accede to that view. The plaintiffs must, in order to succeed, have made out a case of fraud, which they had been unable to do. The bill must be dismissed with costs.

COMMON LAW.

EX. CH. }
7, 8 FEB. 1865. } HALL v. JOHNSON and Another.

ERROR FROM THE EXCHEQUER.

Coram—ERLE, C.J., CROMPTON, BYLES, and
BLACKBURN, JJ.

*Master and Servant — Negligence — Fellow-
labourer — Liability of Master.*

The plaintiff was employed in the defendants' mine, and complained to the underlooker of the defective state of the roof. It was the duty of the underlooker to have the roof propped, and in consequence of his neglecting to do so, a stone fell and injured the plaintiff. The defendants had put the mine into proper working order. There was no evidence that they had personal knowledge of the defective state of the roof, nor that they had shown any want of care in the selection of an underlooker:—

Held, that the plaintiff and underlooker were fellow-labourers in a common employment, and that the defendants were not liable.

Error from the Exchequer on a bill of exceptions.

The 3rd count of the declaration stated, that plaintiff was retained and employed by the defendants to work for them, and did during all the time in the count mentioned, work for them as their servant in an underground passage of a coal mine of the defendants, which the defendants were possessed of, occupied, and managed during all the times, &c., which passage it was at all times, &c., dangerous and unsafe for the plaintiff so to work in, on account of the roof of the said passage being liable and likely to fall down upon the plaintiff while he was so working in the said passage, unless reasonable and proper care, and reasonable and proper precautions were taken by the defendants to prevent such roof from so giving way, and falling upon the plaintiff, while he was so working in the said passage of all which said premises the defendants at all times, &c., had full notice and knowledge. Yet the defendants did not, while the plaintiff was so working, take reasonable or proper care, or reasonable or proper precautions, to prevent the roof of such passage from giving way and falling down on the plaintiff while he was so working therein; and so carelessly and negligently conducted and managed their said mine in that behalf, while the plaintiff was so working in the said passage, and while they knew he was so working therein, and took so little and such bad care of the said mine, and the roof of the said passage while the plaintiff was so working therein, and while they knew he was so working therein, that by reason of

the premises merely, and without any fault of the plaintiff, the roof of the said passage did give way and fall down upon the plaintiff while the plaintiff was so working in the said passage; and a large stone, forming part of the said roof, and which fell therefrom, struck the plaintiff, and maimed and crippled him, whereby, &c. 1st. plea; not guilty. 2nd. That the defendants had not notice that the passage was unsafe and dangerous to work in as therein alleged.

At the trial at the Summer Assizes at Liverpool, 1863, before Blackburn, J., it was proved by the plaintiff that he was employed in a mine of the defendants'. On the 22nd of May, 1862, he was working in the mine at the top of the jigger. There was a large stone in the roof of the passage above where he was working; and several times in the course of the day he told Seddon, the overlooker, that the roof was not safe. At six o'clock in the morning he heard the stone crack, and called Seddon's attention to it. Seddon tapped it with a stick, and said, "Get on with your work; it won't fall to-day, and only for stopping the jigger, I should have it capped." Later in the day the plaintiff again heard the stone crack, and again told Seddon, who tapped it and said, "Get on with your work, the stone won't fall." About eight o'clock the stone cracked again, and again the plaintiff told Seddon. Soon afterwards the stone fell and injured the plaintiff.

Several persons who knew the mine proved that the roof was unsafe in many places and required propping. That the place where the stone fell ought to have been propped. That a stick was not a proper instrument with which to tap the roof. That there were men appointed whose duty it was to tap the roof and see to the dangerous places.

The defendants called no witnesses, and no evidence having been given by the plaintiff of the defendants having any knowledge of the state of the mine, or of any personal interference on their part, the learned Judge directed the jury to find for the defendants. To which direction the bill of exceptions was tendered.

T. Jones, for the plaintiff.

The circumstance which distinguishes this case from others of ordinary occurrence, like *Priestley v. Fowler* (3 M. & W. 1), is that the occupation here was dangerous; and when that is the case it is well laid down that the plant should be carefully looked after.

[BYLES, J., referred to

Gallagher v. Piper, and Lovegrove v. The London, Brighton and South Coast Railway Company,
4 N. R. 291.]

I wish to distinguish this case from all cases where there is no danger. The master ought to have taken precautions to guard against risk, and he cannot throw off the liability attaching to him; his duty is inalienable. For up to the point of making the mine reasonably safe, it is immaterial whether the negligence be that of the master or the servants, in either case the master is liable,

Paterson v. Wallace, 1 Macq. 748;

Brydon v. Stewart, 2 Macq. 30;

Bartonskill Company v. Reid, 3 Macq. 286.

[CROMPTON, J.—A distinction has been suggested between a case where the master lives far away and does not interfere with the working of the mine, but leaves a general manager in charge; and the case where the master himself is continually visiting the works.]

In the cases in the House of Lords it was considered immaterial what the functions of the manager were. What is decided is, that the master cannot divest himself of the liability to make the works safe.

[BLACKBURN, J.—You go to this full extent, that though the master sends down perfectly competent servants with directions to look after the roof of the mine, he is still liable for an accident arising from their neglect.]

The simple evidence of the roof being defective, would on the authority of

Scott v. London Dock Company, 5 N. R. 420;

be enough to raise the presumption of negligence. It was the master's duty to take reasonable and proper care that the roof was kept in a reasonable and proper way. The cases cited 3 Macq. 289—293, clearly show the distinction between those risks which arise in the course of the service from the individual carelessness of a fellow-servant, and those arising from the defective condition of the plant itself. The judgment of Byles, J., in

Clark v. Holmes, 7 H. & N. 937,

goes to show that these are duties which the master cannot throw off, and in the present case it cannot be held that a master having employed a competent agent, is thereby absolved from all further care.

E. James, Q.C. (with him *Crompton Hutton*), for the defendants, was not called upon.

ERLE, C.J. — The plaintiff in this action was a labourer, employed in a mine of the defendants, and was injured by the fall of a stone from the roof of the mine. The evidence is clear that the underlooker of the mine was guilty of negligence in not propping up the roof; and that the accident to the plaintiff was the consequence of his negligence. The question is, whether, under the circumstances, the defendants are answerable for the negligence of the underlooker. There was no evidence that the defendants had not used proper care in the selection of their underlooker. Nor that they had neglected to put the mine into proper working order. On the contrary, there was

evidence that the mine had been properly worked for five or six years. The roof continually required propping from time to time as the coal was removed; the underlooker delayed for one day to give the roof the necessary support, and the consequence of that delay was the accident which happened to the plaintiff. The defendants had no personal knowledge of the state of the roof. Upon these facts, are the defendants responsible for what occurred? We are all of opinion that they are not; that the underlooker and the plaintiff were fellow-labourers pursuing a common employment. And the decisions both in this country and in America, collected in Mr. Smith's book of Master and Servant, show that, under such circumstances, the master is not liable. The question is often one of considerable difficulty, and my Brother Williams brought into prominent relief the fact that the fellow-servant may sometimes stand in the position of deputy-master. Whether in such a case the master would be liable for the acts of the deputy-master, is a point on which we wish to reserve our opinion till the facts raise the question. In this case we think the direction of the learned Judge was right, and the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

Adm.

27, 28 JAN., 3 MARCH, 1865.

} THE HELENE

Before the Right Honourable DR. LUSHINGTON.

Bill of Lading—Charter-Party—24 Vic.
c. 10, s. 6.

If a master accept for shipment from the charterer of the vessel two kinds of goods, the juxtaposition of which may cause damage to one of them, he is bound to take extraordinary precautions, and if he fails to do so, and damage arises, the charterer will not be estopped from suing by reason of the terms of the charter-party requiring the master to receive and stow all goods as they are presented to him for shipment by the charterers.

But whatever the mutual rights of the charterer and master, they will not affect the rights of assignee of the bill of lading of the injured goods against the vessel, except so far as the charter-party is expressly incorporated in the bill of lading.

The mere fact that the cargo is stored by a head steward appointed by the charterer in pursuance of the charter-party, will not exempt the master of responsibility for proper stowage, if the charter-party expressly declares the master responsible.

Blakie v. Stembridge (6 C. B. 894), distinguished.

This cause was instituted under the 6th section of the Admiralty Court Act, 1861, which gives to the Court jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or part thereof

by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master, or crew of the ship, &c. &c.

The facts of the case were as follows :—

On the 16th day of July, 1864, a charter-party was entered into at Leghorn between the master of "The Helene," and Messrs. T. Lloyd & Co. of Leghorn, merchants and charterers of the said ship, the material clauses of which were as follow :

"That the said ship being tight, staunch, and strong, and in every way fitted for the voyage (3/3 in French veritas), shall load here in the customary manner a full and complete cargo of such lawful goods or merchandise as the charterers may require, and stow the same in every part of the said vessel, cabin and fore-castle only excepted. The cargo to be taken alongside and from alongside the ship by the merchants at their own risk and expense, and to be received and stowed by the master as it may be presented for shipment, the charterers being allowed to appoint a head stevedore at the expense and under the inspection and responsibility of the master for proper stowage. No goods to be taken on board the said vessel during the voyage without the charterers' written authority. The master engages to give the same attention to the cargo and the interest of the charterers in every respect as if the vessel were loaded on the berth or on the owner's account, and to measure all measurement goods, and write it on the receipt. Bills of lading to be signed by the master as customary at the charterers' counting-house, and at whatever rate of freight they may require, without prejudice to the present agreement. The ship to be consigned at the port of discharge to the charterers' agent. The said ship to proceed with the said cargo to London or Liverpool at charterers' option, and to deliver the same agreeably to the bills of lading or being paid 285*l.* sterling in a lump sum. The said freight to become due from, and to be paid by, the charterers' agents or assigns on unloading and right delivery of the cargo, in cash, to the master, who will have all legal lien on the cargo to exact such settlement or payment from said agents or assigns, and will have no claim on the charterers after the vessel is loaded or dispatched here. The act of God, restraints of princes or rulers, the Queen's enemies, fire and all and every other dangers and accidents of the seas and navigation of whatever nature and kind soever during this voyage always excepted."

The charterers shipped on board a full cargo, consisting of forty-seven casks of olive oil, and also a quantity of rags and wool. The cargo was stowed by a head stevedore appointed by the charterers, who gave a certificate that he had paid "most particular attention, and taken every possible precaution to protect the cargo from damage." The master signed a bill of lading on the 10th of August, for the olive oil in terms, so far as they are material, as follow :

"Shipped in good order and condition by Thomas

Lloyd & Co., upon the good ship called 'The Helene,' now lying in the port of Leghorn, and bound for Liverpool, forty-seven casks of olive oil, to be delivered in the like good order and condition at the aforesaid port of Liverpool, all and every the dangers and accidents of the seas and navigation of whatever nature or kind excepted, unto order or assigns, he or they paying freight, &c. "—."

"Weight, measurement, and contents unknown : and not accountable for leakage."

The bill of lading was indorsed in blank by the shippers, and assigned to the plaintiffs Messrs. Buscall & Co., oil merchants in Liverpool, and at the time of the institution of this cause the plaintiffs were the owners of the olive oil and the assignees of the bill of lading. "The Helene" arrived in Liverpool on the 19th of October, 1864, and upon the delivery of the forty-seven casks to the plaintiffs it was discovered that many of the casks were wholly or partially empty, and that there was a loss of 2000 gallons of oil out of 4,888. The plaintiffs, thereupon, instituted this cause against the vessel. At the hearing, the cause of the damage was disputed, the plaintiffs contending that the oil had been improperly stowed, by reason that the rags and wool had been stowed in the same hold with the oil, and near to it, and that the heat generated by the rags and wool had caused the casks to fly ; the defendant contending that the loss was simply leakage, the result of defective casks being exposed to a rough voyage. The Court found upon the evidence that the leakage was the result of the juxtaposition of the rags and wool to the casks, in short, of improper stowage.

The defendant also raised the legal question of the plaintiffs' right to bring the action.

Edward James, Q.C., Aspinall, Q.C., and R. G. Williams, for the defendant.

The plaintiffs have no better right against the vessel than Messrs. Lloyd & Co. would have had against her owner. For by the 1st section of the Bills of Lading Act, 18 & 19 Vict. c. 111, the plaintiffs, as indorsees of the bill of lading to whom the property in the goods had passed by reason of such indorsement, have had transferred to and vested in them only such rights of suit in respect of such goods as if the contract contained in the bill of lading had been made with themselves : and the practical effect of the 6th section of the Admiralty Court Act, 1861, is to give to the plaintiffs only the same rights and no others against the vessel. But Messrs. Lloyd & Co., the shippers, would have had no rights against the ship-owner ; for they and not the master were responsible for the defective stowage, inasmuch as—

1st. They were the charterers, and furnished the whole cargo, and the master was by the charter bound to receive and stow it as it might be presented for shipment.

2nd. In accordance with the charter the whole cargo was stowed by the head stevedore appointed by the charterers : and this exonerates the master,

Blakie v. Stembridge, 6 C. B. 894.

Brett, Q.C., and *V. Lushington*, for the plaintiffs.

Their arguments will be found embodied in the judgment.

DR. LUSHINGTON.—If the master, even under the terms of a charter-party like the present, takes on board both goods in wooden casks and also rags and wool—which has been proved to be at all times a hazardous thing—I apprehend he is bound to take extraordinary precautions to prevent mischief, and cannot protect himself by showing that all the cargo was shipped by the same person. For “an authority by the shipper or charterer to stow the goods clearly does not amount to an authority to stow them in a careless or negligent manner,” *Hutchinson v. Guion* (5 C. B. 149). In the present case the master was guilty of negligence in not separating the rags and wool from the casks of oil. Then as to the defendant’s contention, that he was not responsible, because the cargo was loaded by a stevedore appointed by the charterers, I think this case is removed out of the authority of *Blakie v. Stembridge* (*loc. cit.*), where the charter-party did not contain the important words of this charter-party, that the cargo was to be loaded by the stevedore, &c., “under the inspection and responsibility of the master for proper stowage ;” and where the Court held the true construction of the charter-party to be “that the cargo was to be brought alongside at the risk and expense of the charterer, and was to be shipped and stowed by his stevedore, and consequently at his risk, though at the expense of the shipowner, and subject to the control of the master on behalf of the shipowner to protect his interests.” There seems, therefore, no reason for saying that Messrs. Lloyd & Co., the shippers, would have been estopped from suing the master on account of improper stowage.

But even if the shippers would have been estopped, it does not follow that the plaintiffs, as assignees of the bills of lading, would be estopped also. Shippers and assignees of bills of lading do not stand to each other as agent and principal, but as vendor and purchaser. Even on consideration of the Bills of Lading Act alone, irrespective of the 6th section of the Admiralty Court Act, 1861, the rights and liabilities which the assignee of the bill of lading has transferred to him—being the rights and liabilities in respect of the goods as if the contract contained in the bill of lading had been made with him—cannot include the mutual rights and liabilities of the shipper and master dehors of that contract in respect of other goods, or of the terms of the charter-party, &c. For were this so, the bill of lading would always be taken to incorporate the charter-party ; but this it never does, unless the terms of the bill of lading expressly require it,

Chappell v. Comfort (31 L. J. C. P. 58). I think the rights of the plaintiffs as assignees of the bill of lading could not be curtailed by any liability of the charterers towards the master, not being a liability imposed upon the plaintiffs under the bill of lading.

The objections therefore to the plaintiffs’ right of action fail, and there must be judgment for the plaintiffs, with the usual reference to the Registrar and merchants to estimate the damage.

Adm.

31 JAN., 3 MARCH, 1865.

} THE SPIRIT OF THE OCEAN.

Before the Right Honourable DR. LUSHINGTON.

Limited Liability — Registration — “Owners,”
25 & 26 Vict. c. 63, s. 54.

On July 24, A, a registered part-owner of a vessel, transfers his shares, by bill of sale, to B. B does not register. On the 22nd of November, a collision takes place, A being on board the vessel as master. B subsequently registers. On a cause for limited liability being instituted by all the registered co-owners of the vessel exclusive of A, but inclusive of B :—

Held, that the word “owners” in the 54th section of the Merchant Shipping Amendment Act, means equitable as well as registered owners, and therefore,

1st. That A was not an owner, but, that even if he had been, his default could not deprive the absent co-owners of their right to limited liability.

2nd. That B was an owner, entitled to claim limited liability.

This cause was instituted under the 54th section of the Merchant Shipping Act Amendment Act, 1862, for the purpose of limiting the liability of the owners of “The Spirit of the Ocean,” which they might have incurred by reason of a collision of their vessel with “The Robin Hood.” Roulle Cary, jun., the master of the vessel, had in the month of January, 1864, become the registered owner of 6-64ths of “The Spirit of the Ocean.” It appeared he had become the purchaser of these shares by the assistance of his father, Roulle Cary, sen., who was desirous that his son should obtain command of the vessel. On the 24th of July following, Roulle Cary, jun., by bill of sale, transferred his shares to his father. On the 22nd day of November, 1864, the collision took place ; at the time of the collision, Roulle Cary, jun., was on board, and in command of “The Spirit of the Ocean ;” but the bill of sale of his shares to his father had not been registered, and was not registered until the 30th of November. The cause for limited liability was instituted by Roulle Cary, sen., and the other registered co-owners exclusive of Roulle Cary, jun.

Clarkson, for the plaintiffs.

V. Lushington, for the defendants, the owners of “The Robin Hood” and her cargo.

The word “owners” in the Merchant Shipping Act

and Amendment Act, means registered owners. If so, 1st. Roulle Cary, jun., the master, was an owner at the time of the collision; and as he was in command, the loss arose by his actual fault and privity, and he at least is not entitled to limited liability.

2nd. The other registered co-owners, though not on board at the time, are deprived of the right they would otherwise have to limited liability. For the actual fault and privity of one co-owner, is the actual fault and privity of all within the terms of the 54th section of the Merchant Shipping Amendment Act, 1862, "the owners of any ship shall not in cases where loss occurs without *their* actual fault or privity be answerable to an aggregate amount exceeding," &c. These terms point to a collective liability, especially when contrasted with the terms of former enactments respecting limited liability.

53 Geo. 3, c. 159, s. 1, "No person or persons who is or are owner or owners or part-owner or part-owners of any vessel, shall be liable to answer for any damage arising by reason of any neglect without the fault or privity of such owner or owners," &c.

And the 504th section of the Merchant Shipping Act:—"No owner of any sea-going ship or share therein shall in cases where any of the following events occur, without *his* actual fault or privity, be answerable," &c.

Wilson v. Dickson, 2 B. & A. 2.

3rd. Roulle Cary, sen., is not an owner within the terms of the 54th section of the Merchant Shipping Amendment Act, 1862, and therefore cannot claim limited liability: but as he is equitable owner, his liability is unlimited,

Nostra Signora de los Dolores, 1 Dods. 290.

Clarkson, in reply.

The word "owners" in the Merchant Shipping Act and Amendment Act means equitable as well as registered owners,

Sections 18, 38, 39, 42, 43, 44, 56, 58, 62, and 516 of Merchant Shipping Act, 1854.

1st. Roulle Cary, jun., had by the bill of sale, though not registered, divested himself of all interest in the ship.

2nd. In any case the other co-owners cannot be prejudiced by the act of Roulle Cary, jun., even if he is owner. The collision did not take place by "their actual fault;" co-owners of a ship are not a corporation, nor are they partners.

3rd. Roulle Cary, sen., is entitled to limited liability.

DR. LUSHINGTON.—Mr. Roulle Cary, jun., was the vendor; his father the vendee. Registration is clearly the interest and duty of the vendee, it is no part of the duty of the vendor. The execution of the bill of sale *ipso facto* divests the vendor of all interest in the vessel; and thereupon he ceases to be an owner within the terms of the 54th section of the Merchant Shipping Amendment Act. Consider the consequences

of an opposite decision. Suppose a part-owner is abroad, it may be in the East Indies; he is desirous of selling his share: he executes a bill of sale and delivers it. How is he to effect registration? He has no means of so doing: is his responsibility to last until he can effect registration? I must hold, therefore, Roulle Cary, jun., not to be a part-owner of this vessel. But in any case the act of Roulle Cary, jun., as part-owner, could not deprive the absent co-owners of the right of limited liability. To hold otherwise would be contrary to the principle of this statute, and I may say all the other statutes conferring the right of limited liability, for the only ground of exception to this right which is recognised is personal blame; it would also be to punish A for the fault of B, which, in the absence of some special reason, would be unjust, and no such special reason is in this case recognised by the Legislature. I think the judgment of *Wilson v. Dickson* (2 B. & A. 2) is applicable, although given upon the words of an earlier statute, for though there is a difference in the phraseology of the statutes, as pointed out in the argument, yet it is impossible to infer therefrom that the Legislature intended to impose a new liability, and make one co-owner responsible for the default of another.

Lastly, as to Roulle Cary, sen. A purchaser, having neglected to register, does not thereby escape liability altogether; but why should his liability not be limited? All the reasons upon which the right to limited liability is founded apply to unregistered equally with registered owners, and in this respect I see nothing in the Act to make a distinction between them.

I, therefore, pronounce for limited liability, in accordance with the prayer of the petition.

Adm.

3 MARCH, 1865. } THE MARY ANNE.

Before the Right Honourable Dr. LUSHINGTON.

Salvage—Jurisdiction—"Sum in Dispute"
17 & 18 Vict. c. 104, s. 464.

Salvors sent in a formal demand, in writing, for 40l.: on this being refused, they claimed before the Justices a sum not exceeding 200l., and the Justices found no salvage was due: the salvors appealed to the Admiralty Court:—

Held, that within the meaning of the 464th section of the Merchant Shipping Act, "the sum in dispute" did not exceed 50l., and therefore the Admiralty Court had no jurisdiction to entertain the appeal.

This was an appeal from the award of two Justices of the Peace at Southampton in an alleged cause of salvage, and the respondents questioned the jurisdiction of the Admiralty Court, on the ground that "the sum in dispute" did not exceed 50l., and therefore, under the 464th section of the Merchant Shipping Act, no appeal was allowed. The facts were as follows:—

A dispute arose between the master of "The Mary Ann" and the alleged salvors, as to whether anything or what was due for salvage: the salvors sent in a formal claim, as follows:

"Dock Chambers, Canute Road,
"Southampton, , 1863.

"Captain and Owners Brig 'Mary Ann.'

"Drs. to the Southampton Steam Towing
Company (Limited).

"Dec. 31. To towing of ship's boat to
brig, towing brig off to
Brambles, thence to Bri-
tannia Wharf. . . £40 0 0."

When the salvors came before the Justices of the Peace, they demanded no specific sum; but, as appeared from the award of the Justices, they claimed a sum not exceeding 200*l.*—that sum, 200*l.*, being the extreme sum that could be claimed before the Justices under the 460th section of the Merchant Shipping Act. The Justices were of opinion that no salvage was due, and awarded accordingly.

Deane, Q.C., and *V. Lushington*, for salvors.

Twiss, Q.C., and *Clarkson*, for the defendants.

DR. LUSHINGTON.—The sum in dispute has, in a previous unreported case, *The Eliza Anne*, been held to be not the sum awarded, but the sum claimed: the question, then, here is, What is the sum claimed? I lay out of my consideration all loose expressions which may have occurred in conversation between the master of "The Mary Anne" and the salvors; but it is clear that the salvors made a formal demand, in writing, for 40*l.* It is true that the plaintiffs by making this demand may not absolutely have debarred themselves from suing for a larger sum; but their demand from the Justices was, not for a sum exceeding 50*l.*, but for a sum not exceeding 200*l.* I think this must be taken to have reference to the previous claim of 40*l.*, and therefore to constitute the sum in dispute. The Court accordingly cannot entertain this appeal. It has been contended that the objection to the jurisdiction has been taken too late: but I apprehend if at any time the Court discover it has no jurisdiction, it cannot proceed further; the delay of one or both parties cannot confer jurisdiction. The appeal must be dismissed with costs.

EQUITY.

Privy Council. } THE FUSILIER AND CARGO.
9 FEB. 8 MARCH, 1865. }

Present—LORD CHELMSFORD and LORDS JUSTICES
KNIGHT BRUCE and TURNER.

Salvage—17 & 18 Vict. c. 104, ss. 458, 459—
Liability of Cargo.

The owners of the cargo on board a ship to which salvage services had been rendered, denied their liability to pay salvage except for services rendered to the cargo:—

Held, that they were liable to contribute towards life salvage.

This was an appeal from the Admiralty Court.

The principal question raised was, whether by the 458th and 459th sections of the Merchant Shipping Act, 1854, the owners of the cargo of a vessel to which salvage services had been rendered, are liable to contribute to that portion of the claim of the salvors which arises from the saving of the lives of the passengers on board the vessel. There was another subordinate question as to the amount of salvage awarded to some of the salvors.

The appellants, the owners of the cargo on board "The Fusilier," the vessel saved, admitted that the owners, masters, and crews of the different vessels to whom salvage was awarded, were entitled to remuneration for their services. The value of the ship was 2,500*l.*, of the freight 2,581*l.* 17*s.* 8*d.*, and of the cargo 52,000*l.* The Judge of the Court of Admiralty pronounced "the sum of 2,200*l.* to be due to the salvors for the salvage services rendered by them to the vessel 'Fusilier' and her cargo, and for their services in saving the lives of the passengers on board the vessel, namely, to the master, owners, and crew of the steam-tug 'Aid,' the sum of 700*l.*; to the master, owners, and crew of the life-boat 'Northumberland,' the sum of 700*l.*; and to the masters, owners, and crews of the luggers 'Champion' and 'Lotus,' the sum of 800*l.*, together with costs." The services rendered were as follows: On the 3rd of December, 1863, "The Fusilier" was aground on the Girdler Sand. The steam-tug "The Aid" and the life-boat "The Northumberland" had been rendering assistance, and had succeeded in taking all the passengers out of "The Fusilier" and placing them in safety on board "The Aid," to be conveyed to Ramsgate. "The Aid" received an order from "The Fusilier" to bring an anchor and chain from Ramsgate, to be used in getting her off the sand. The weight of the anchor and chain procured for this purpose

was found to be too great for "The Aid," and it was necessary to employ the two luggers, "The Champion" and "The Lotus," to carry them off to "The Fusilier." These vessels anchored near "The Fusilier" at midnight of the 4th of December, and remained by her the whole night. On the following day unsuccessful attempts were made to tow "The Fusilier" off the sand. In the course of the afternoon of the 5th of December, the gale, which had been blowing from the westward, changed to the southward, thereby lessening the chance of "The Fusilier" being got off the sand, and the luggers were ordered to proceed to the Nore, and remain there till the weather moderated. They remained at the Nore from the 6th to the 10th of December; then, according to instructions, they returned to "The Fusilier," which, not being sufficiently light to float, although part of her cargo had been removed, they were ordered back to the Nore, still with the anchor and chain on board; and "The Fusilier" having been got off the sand on the 11th of December, they followed her to the Blackwall Docks, and finally arrived at Ramsgate on the 14th of December.

The Queen's Advocate and Potter, for the appellants, the owners of the cargo, contended—

That by the Merchant Shipping Act, 1854, the Legislature intended to distribute the various liabilities; the services rendered to the ship or boat, were to be paid for by them, the services rendered to the cargo by the cargo. How could the owner of the cargo be interested in the preservation of lives? Up to the time of the Merchant Shipping Act, there had been no power to remunerate directly for life salvage, but where there had been life saved, the general award was higher. By section 459 of the Act, the Legislature intended that the owners of the ships should alone be liable for payment in respect of life salvage. They cited,

The Westminster, 1 W. Rob. 229;

The Johannes, 1 Lush. 182;

Abbott's Law of Shipping, 504;

The Vrede, 1 Lush. 322;

Towle v. Great Eastern, 11 L. T. (N. S.) 518;

The Undaunted, 1 Lush. 90.

Manisty, Q.C., and *V. Lushington*, for the owners of the ship, contended that the cargo was liable, and cited,
9 & 10 Vict. c. 109, s. 10;
Dowdeswell Mer. Ship. Act, 193.

Dr. Deane, and *E. C. Clarkson*, for the salvors, contended, that all the Act had done was to enable the

Court to do directly what before it could only do indirectly. The cargo was distinctly liable for life salvage.

Potter, in reply.

LORD CHELMSFORD delivered the opinion of the Court and said: The principal question in the case was one of great importance, and of some difficulty. Prior to the passing of "The Merchant Shipping Act, 1854," the Court of Admiralty, in a cause of salvage where no property had been rescued from peril, but where life had been saved, had no power to award anything to the salvors. But where both property and life had been saved, it was the well-established practice of the Court to increase the amount of salvage, and thus indirectly remunerate the salvors for the merit due to their having saved life as well as property. Of course, as the salvage was awarded in one entire sum, the owners of the cargo, as well as of the ship and freight, contributed their proportion to the payment of this increased salvage, and so in a certain sense were rendered liable to the payment of what is called life salvage.

Before the passing of "The Merchant Shipping Act, 1854," the Legislature had provided for the payment of a reward or compensation by way of salvage for the saving of the life of any person on board a ship or vessel in distress, by the 19th and 21st sections of 9 & 10 Vict. c. 99, "An Act for Consolidating and Amending the Laws relating to Wreck and Salvage." The provisions of these sections were substantially reenacted in "The Merchant Shipping Act, 1854," and therefore need not be further noticed.

In construing the 458th and 459th sections of the Act on which the principal question arose, the recognised practice of the Court of Admiralty of indirectly rewarding salvors for the saving of human life by giving an increased rate of salvage on that account, must always be borne in mind. The Legislature in dealing with the subject of life salvage must be taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly. And it must also be remembered that by the established practice of the Court, the owners of cargo were always rendered virtually contributory to the reward and compensation given to salvors for the preservation of life. Under these circumstances the provisions in the sections in question were introduced. The 458th section is in these terms—

"Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

"1. In assisting such ship or boat;

"2. In saving the lives of the persons belonging to such ship or boat;

"3. In saving the cargo or apparel of such ship or boat, or any portion thereof;

"And whenever any wreck is saved by any person other than a Receiver within the United Kingdom;

"There shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services, or the saving of such wreck; the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined, in case of dispute, in manner hereinafter mentioned."

The general rule as to the parties liable to pay salvage was, that the property actually benefited was alone chargeable with the salvage recovered. But this rule was inapplicable in the case of life salvage, because it was difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress, would be of any benefit, either to the vessel or to the cargo. The Legislature, therefore, could not have intended that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seemed to have been contemplated was, that there should be included in the entire sum payable for salvage of ship and cargo, a distinct reward for the preservation of human life. It was argued, on behalf of the appellants, that when the 458th section, after describing the services to be rendered in assisting the ship or boat, in saving the lives of the persons belonging to the ship or boat, and in saving the cargo or apparel of the ship or boat, said, "there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck," a reasonable amount of salvage, the words must be read *reddendo singula singulis*. But, although this might very well be, if the section had confined the claim to salvage to the saving of the ship and cargo and apparel, for then each species of property benefited would alone have been chargeable; yet where, amongst the other subjects of claim, the saving of human life was included, there was no reason why that should be referred to the ship any more than to the cargo, since the one derived no more benefit than the other from the services rendered. The Legislature seemed merely to have had in view the rewarding at a higher rate persons whose services were more meritorious, from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach, without any distinction, upon all the owners of property exposed to the common danger. And as the salvage was always awarded in a gross sum, and under this section was to be increased by the reward for the saving of life, the owners of cargo, since the Act, were liable exactly to the same extent as before, with this immaterial difference, that there now was a distinct and express item of claim to increase the amount of salvage to which they were contributory, instead of the whole being estimated upon a higher scale. But

it was said that the 459th section of the Act showed that it must have been intended by the Legislature that the owners of the ship should alone be liable to the payment of life salvage, for it enacted, that "salvage, in respect to the preservation of the life or lives of any person belonging to any such ship or boat, shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may, in its discretion, award to the salvors of such life or lives, out of the Mercantile Marine Fund, such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives."

There was no doubt that this section created some difficulty as to whether the Legislature intended that life salvage should be payable by any other persons than the owners of the ship, but if such was the intention it would have been easy to have expressed it, and the language of the section was capable of the construction that it merely fixed the limit of the shipowner's liability, and did not mean to render him solely liable to the payment of this description of salvage. And whatever doubt might be thrown upon the subject by this section, there were two subsequent sections of the Act, the 468th and the 469th, which appeared to be susceptible of no other interpretation than that the owners of cargo were intended to bear a proportion of the payment for life salvage. The 468th section enacted "that whenever any salvage is due to any person under this Act, the receiver shall act as follows (that is to say): If the same is due in respect of services rendered in assisting any ship or boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof, he shall detain such ship or boat, *and the cargo* and apparel belonging thereto, until payment is made, or process has been issued by some competent Court for the detention of such ship, boat, cargo, or apparel." It was thus expressly provided, that in the case of salvage being due for services rendered in saving the lives of persons belonging to the ship, the cargo should be detained. And it was not intended that it should be merely held as additional security with the ship for payment of the salvage, for the 469th section enacted, that "whenever any ship, boat, cargo, apparel, or wreck so detained by any receiver for non-payment of any sums so due as aforesaid (that is, amongst others, for services rendered 'in saving the lives of persons belonging to the ship'); the receiver in certain cases may sell such ship, boat, cargo, apparel, or wreck, and out of the proceeds of the sale defray all sums of money due in respect of salvage." Whatever difficulty, therefore, might be supposed to be created by the 459th section, it seemed impossible to read the two last-mentioned sections without being satisfied that they proceeded upon the

ground of the owners of cargo being liable to the payment of life salvage. The object of the Legislature in the different sections referred to seemed to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life, by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril, more than on another. Their Lordships, after much consideration, had arrived at the same conclusion with the learned Judge of the Court of Admiralty, and they would, therefore, humbly recommend to Her Majesty that the decree appealed from should be affirmed, and that the appeal should be dismissed with costs.

Lords Justices. } *Re* BATEMAN'S SETTLED
11 MARCH, 1865. } ESTATES.

Practice—19 & 20 Vict. c. 120, s. 20—
Cons. Ord. XLI., r. 15.

The description in advertisements, under the Leases and Sales of Settled Estates Acts, of the settled estates proposed to be sold, must strictly follow the description in the heading of the petition.

In this case a petition had been presented by trustees and two infant *cestuis-que-trustent*, under the Leases and Sales of Settled Estates Acts, intituled in the Acts, and "in the matter of a freehold messuage or tenement and hereditaments situate and being No. 29, St. James's Street, *in the parish of Brighthelmston*, in the county of Sussex, *now unoccupied*, and subject to the trusts of an indenture of settlement dated," &c.

The words in italics were omitted in the advertisements, and Stuart, V.-C., refused to make the order until fresh advertisements had been published with those words added.

The petition was not served on any person.

Babington now mentioned the circumstances to the Court by way of appeal, and stated that the Vice-Chancellor had refused to allow the petition to be amended by striking out of the title the words which had been omitted in the advertisements.

He referred to

Re Bunbury's Settled Estates, 5 N. R. 229.

THE LORDS JUSTICES refused the application, saying that they should be sorry to interfere with the Vice-Chancellor's discretion in the matter, and that it was undesirable to let in any looseness as to the practice on such a subject.

Master of the Rolls. } COLBY v. GADSDEN.
6, 7, 10 MARCH, 1865.

*Contract—Specific Performance—Dispossession
of the Purchaser—Waiver of the Contract.*

A vendor let a purchaser into possession of the rents of an estate before the completion of the contract; but subsequently, after the time fixed for completion of the contract, he, in consequence of the non-payment of the purchase-money, turned the purchaser out of possession:—

Held, that he did not thereby abandon his right to a specific performance of the contract.

Knatchbull v. Grueber, 3 Mer. 124, explained and distinguished.

By an agreement, made on the 13th day of October, 1860, it was agreed between the plaintiff and the defendant as follows:—that the defendant should purchase from the plaintiff an estate called Colby Lodge, with the minerals thereunto belonging, at the price of 3,775*l.*, to be paid on the 25th day of December, 1860; that the defendant should be entitled to the possession of the estate on the same day; that the conveyance should be executed on or before the same day; that upon the delivery of such conveyance to the defendant, the purchase-money should be paid; and, if the purchase was not completed on the 25th day of December, 1860, that the defendant should pay interest on the purchase-money from that day.

Shortly after the 13th day of October, 1860, the plaintiff allowed the defendant to let a mansion-house on the estate, and to receive the rents of the estate.

On the 29th day of July, 1861, the defendant's solicitors sent to the plaintiff the draft conveyance, which was, on the 2nd day of August, 1861, returned to them approved.

On the 22nd day of March, 1862, the plaintiff proposed that the agreement should be cancelled upon payment within one week by the defendant of the sum of 10*l.*, and upon the condition that the plaintiff should receive all rent then due from the tenants of the estate up to that time. This proposal was at first, without the knowledge or consent of the defendant, accepted by his wife, but in the month of May, 1862, when the defendant was first made acquainted with the proposal, he refused to cancel the agreement, and required the same to be carried into effect.

There was continued delay in the payment of the purchase-money; and on the 26th day of July, 1862, the plaintiff gave notice to the tenants of the estate to pay their rents to him, which they accordingly did up to Lady Day, 1862, since which time they had not paid any rent whatever.

The defendant never having paid the purchase-money, or any interest in respect thereof, the plaintiff on the 23rd day of December, 1862, filed his bill for specific performance of the agreement, and for an

inquiry as to the damages he had sustained in consequence of the non-performance of the agreement.

The defendant alleged that the agreement was void by reason of four particulars. He objected,

First, that the lapse of time before the filing of the bill, was a bar to the suit:

Secondly, that the plaintiff, by resuming possession of the estate, had abandoned the contract:

Thirdly, that, subsequently to the contract, he discovered that a small portion of the estate had been, previously to the contract, given and conveyed away by the plaintiff for the purposes of a national school:

And lastly, that a good title was not shown by reason of the minerals, which were under the estate, and which the agreement purported to sell, having been, previously to the agreement, exhausted, if not wholly worked out.

With regard, however, to this last objection, it was proved that the defendant had, on the 7th day of November, 1860, valued the surface of the estate, independently of minerals and timber, at the sum of 4000*l.*, and that a coal-mine agent had offered to the defendant the sum of 800*l.* for the coal under the estate.

Southgate, Q.C., and *Babington*, for the plaintiff, cited,

Macbride v. Weekes, 22 Beav. 533;
Watson v. Reid, 1 Russ. & My. 236;
Southcomb v. The Bishop of Exeter, 6 Hare, 213;
Knatchbull v. Grueber, 3 Mer. 124;
Sug. V. & P. 212 (14th ed.);
Dyer v. Hargrave, 10 Ves. 505;
Ridgway v. Sneed, 1 Kay, 627;
Haywood v. Cope, 25 Beav. 140.

Selwyn, Q.C., and *Swan*, for the defendant, contended, that as the plaintiff had chosen to turn the defendant out of possession, there could be no decree for specific performance, for the plaintiff had by his act destroyed the contract. The case was governed in this respect by,

Knatchbull v. Grueber (*loc. cit.*).

They also cited,

Higgins v. Samels, 2 J. & H. 460;
Moxey v. Bigwood, 10 Jur. (N. S.) 597.

Southgate, Q.C., in reply.

THE MASTER OF THE ROLLS said: It was obvious that this was not a case in which the Court would refuse to decree specific performance on account of delay. In all such cases as the present, if one of the contracting parties said that he would have nothing more to do with the contract, and if both of the contracting parties were in the same position as they were in before the commencement of the contract, then if a bill were not filed speedily, that is to say, within a time which had not been accurately fixed, but which generally exceeded a year, the Court would refuse to decree specific performance. In the present case,

however, both of the contracting parties were insisting on the performance of the contract; in the month of May, 1862, the defendant required it to be carried into effect, and had all along been insisting upon its performance. No question of repudiation arose until the month of July, 1862, and, as the bill was filed in the month of December, 1862, there was no delay which could debar the plaintiff from his rights.

With regard to the second point, it was said that the plaintiff, having put the defendant into possession of the estate, had now resumed possession, and had thereby abandoned the contract. Upon this point the case of *Knatchbull v. Grueber* (*loc. cit.*) had been relied upon; that, however, was a case in which, it being essential for the defendant to obtain possession of a house, he had contracted that upon the execution of the agreement, he should be put into possession of the house, and should remain there until the completion of the contract. He never accepted the title of the plaintiff, and in short it appeared that the plaintiff was unable to make a title to the whole of the property sold. Upon the defendant declining to accept the title of the plaintiff to the whole of the property, the plaintiff turned him out of possession of the house, and filed a bill for specific performance of the contract. Lord Eldon did not inquire whether it was a case for compensation, but observed that the object of the defendant was to obtain possession of the house, and that he had made a contract for that purpose, which was totally independent of any question as to the plaintiff's title to the rest of the estate. Lord Eldon said that the plaintiff had turned the defendant out of the very thing for which he had contracted, and that the plaintiff had thus abandoned the contract, and could no longer enforce it; and it was upon this ground that Lord Eldon dismissed the bill.

That case, however, had no application to the present case, or to the defendant's possession of the estate by receipt of the rents. A purchaser was entitled to the rents of an estate from the time fixed upon for completing the contract, whether he did or did not take possession of the estate; and from that time he had to pay interest for the purchase-money, if it was not paid at the day.

In the present case, the time fixed for completing the contract, was the 25th day of December, 1860; and from that time the defendant had received the rents of the estate. And what did the plaintiff do? He neither got the purchase-money nor the rents: so he gave notice to the tenants not to pay their rents to the defendant; and subsequently he filed the present bill. This was not a case of any breach of contract, nor was it one to which the case of *Knatchbull v. Grueber* (*loc. cit.*) had any application.

With regard to the third objection: a school-house had been built upon a small plot of land, which had been given away by the plaintiff a year before the contract, and which, as the defendant alleged, was in-

cluded in the contract. In respect of this, the defendant claimed to be entitled, either to put an end to the contract, or to have compensation. His Honour, however, was of opinion that the defendant was not so entitled. This was a small piece of land, 45ft. long by 65ft. broad, containing a little under 330 square yards. Upon this land a house had been built, and the defendant saw it, and was aware of its existence. In a map, upon the faith of which the defendant had bought the estate, the plot in question was marked out as not included in the contract. The matter was, therefore, so patent, that the defendant was not even entitled to compensation in respect thereof.

The last question related to a vein of coal. It was stated in the particulars of sale, that the estate lay on a vein of coal, which was marked in a map annexed to the particulars. His Honour was, however, satisfied that the defendant knew that the coal had been worked, and that this was a case to which the maxim of *caveat emptor* should be applied. The defendant knew that the coal had been worked, and it was his business to examine how far the working had extended. The coal was not worked out; and, besides, in the opinion of his Honour, it did not form any ingredient whatever in the price which the defendant offered for the estate, and was not considered by him to be of much value. There would be a decree for specific performance, with an inquiry as to damages; and the defendant, having occasioned the suit, would pay the costs up to and including the hearing.

Kindersley, V.-C. } GRUGGEN v. COCHRANE.
3 MARCH, 1865.

*Practice—Order 26th of August, 1841,
r. XLVI.*

Where a creditor on a debt, in its nature not bearing interest, had come in and proved his debt before the Master, before the 26th of August, 1841, but the Master's certificate was not made till after that date, interest was not allowed.

This was a petition in an administration suit, in which certain simple contract creditors had come in before the Master, and taken all steps necessary for the proof of their debts, previous to the 26th of August, 1841; but the certificate of proof was made after that date. The question was, whether these debts carried interest under the order of the 26th of August, 1841.

This order, which differs slightly from the Consolidated Order XLVI. r. 10, was as follows—

XLVI.—“That a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master in a suit, under a decree or order in a suit, shall be entitled to interest upon his debt, at the rate of 4l. per cent., from the

date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest."

Anderson, Q.C., and *E. F. Smith*, for the petitioner, contended that the debts under consideration did not come within the terms of the above order, and would not bear interest,

Spencer v. Butler, 5 Jur. 1130.

Glasse, Q.C., and *Dickinson*, for those simple contract creditors, the interest on whose debts was in dispute, *contrd.*

Anderson, Q.C., in reply.

KINDERSLEY, V.-C., said: The words "under a decree or order" must be taken to include a pending suit and to be to that extent retrospective; but, though the contention of the petitioner involved the strange anomaly, that, under the same decree, debts of the same nature, according to the time of their proof, would or would not bear interest, he must hold, considering the language of the order, that the debts in question did not bear interest.

**Kindersley, V.-C. } THE CURRIERS' COMPANY
8, 9, 10 MARCH, 1865. } v. CORBETT.**

Ancient Lights—Damages—Implied Reservation.

Where the owner of two adjacent premises sells one of them, there is no implied reservation of a right to light and air in the other.

The plaintiffs in this suit have for many years owned, as trustees for a charity, three small houses in Helmet Court (a small court twelve feet wide), in the City of London; viz., Nos. 1 and 2 on the west side, and a smaller tenement on the east side opposite No. 1, late in the occupation of one Smith.

The defendant having bought up the property on each side and at the back of Smith's house for the purpose of erecting a large building for offices on the site, contracted with the plaintiffs for the purchase of that house, and the conveyance thereof to him was executed on the 25th of July, 1864.

In the opinion of the Court, the plaintiffs first became aware on the 31st of August that the defendant intended to carry his new buildings, which were then in progress, to a great height above that of the old buildings, so as to interfere with the access of light and air to their buildings Nos. 1 and 2. On the 3rd of September complaint was made to the defendant, but the works were hurried on, and completed on the 12th. On the 13th the bill was filed, which prayed for an injunction to restrain the defendant from "erecting or continuing the erection of" buildings, so as to interfere with the light and air coming to the plaintiffs' houses Nos. 1 and 2. There was no prayer for damages.

The house No. 2 had been burnt down and rebuilt about fifteen years ago, and the defendant alleged that by reason of alterations in the windows, the plaintiffs had lost their ancient lights as to that house.

The cause now came on for hearing.

Baily, Q.C., and *Sheffield*, said, that the buildings having been completed, and the plaintiffs considering they would sufficiently protect the interest of the charity for which they were trustees by so doing, they would only ask that damages should be given instead of a mandatory injunction to pull down any part.

They contended that, at the rebuilding of house No. 2, the ancient lights had been preserved, and had not been since affected, either as to Nos. 1 or 2, by the sale of Smith's house.

Glasse, Q.C., and *Lindley*, for the defendant, argued that Smith's house had been sold by the plaintiffs without any reservation, and, therefore, upon that portion, at any rate, the defendant had a right, as against the plaintiffs, to erect whatever building he pleased,

Tenant v. Goldwin, Ld. Raym. R. 1093;

White v. Bass, 8 Jur. (N. S.), 312;

Suffield v. Brown, 3 N. R. 340.

The plaintiffs had been guilty of laches, they knew or might have known what sort of a building was to be erected. The bill was not filed till the day after the building was completed; it did not pray for damages, and, under the circumstances, the plaintiffs were clearly not entitled to a mandatory injunction,

Isenberg v. East India House Estate Company, 3 N. R. 345;

Johnson v. White, 12 W. R. 234;

Jackson v. Duke of Newcastle, 4 N. R. 443.

Baily, Q.C., in reply.

10 MARCH, 1865.

KINDERSLEY, V.-C., said: The question as to whether, at the re-building thereof, the ancient lights of house No. 2 were lost, was,—whether a material and additional servitude, or a materially different servitude would have been imposed by the new windows upon the adjacent premises: this question was one of fact. In his opinion, the new windows were very nearly of the same size as the old ones, but differed a little in shape, but not so much as to make a material variation in the servitude imposed. The character of ancient lights, therefore, attached to the plaintiffs' windows.

He was also of opinion that the new buildings did materially affect the plaintiffs' right to light and air.

The plaintiffs had sold the premises, late Smith's, without any reservation, and, therefore, upon the authorities, which were stronger, he confessed, than he had been aware of, the defendant had upon that part of the ground, a right to raise a building as high as he pleased.

It had been argued that the plaintiff had been guilty of laches, it did not, however, appear that they were actually aware to what height the new building

was intended to be raised till a fortnight before their bill was filed, and, considering that they were a corporation, perhaps they could hardly have acted quicker.

His Honour accordingly directed an inquiry to ascertain what damage had accrued to the plaintiffs' property by the raising of so much of the defendant's buildings as was not erected upon the premises bought from the plaintiffs to a height greater than that of the buildings which had been pulled down.

Kindersley, V.-C. } **COFFIN v. COOPER.**
10, 11 MARCH, 1865.

Power of Appointment—Will only—Covenant to appoint a certain Sum to a particular Child—Validity of Appointment.

*F, the tenant for life of a settled fund, with power to appoint the same among her children by will only, covenanted with certain bankers that she would appoint not less than 1000*l.* thereof to her son, J. F., to secure a credit to be given by them to him. F, by her will, appointed 1100*l.* stock to J. F., with the request that he would employ it in defraying his debt to these bankers:—*

Held, that the appointment was valid.

This was a petition in the above suit, for the payment of money out of Court to Mr. John Field, to whom the sum of 1100*l.* stock had been appointed by the will of his mother, Mrs. Field.

Mrs. Field, under her marriage settlement, had a power of appointment among her children, by will only, over the corpus of certain stock, now standing to the credit of the above cause; of which stock she was made tenant for life, with a gift over in default of appointment among her children, who should attain twenty-one or marry, equally.

By two indentures, made between Mrs. Field, Mr. J. Field, and certain bankers, Mrs. Field covenanted that she would appoint, by her will under the above power, not less than 1000*l.* to Mr. J. Field; who, by the same deeds, assigned all his interest in the above-mentioned stock to the same bankers, in order to secure a credit given by them to him. Mrs. Field, accordingly, by her will, after reciting the above deeds, appointed the sum of 1100*l.* stock to Mr. J. Field, with the request that he would employ the same in defraying his debt to the bankers.

A question was now raised as to the validity of the appointment, as not being a proper execution of the power.

Baily, Q.C., and *Everitt*, for the petitioner, Mr. John Field, argued that

Stroud v. Norman, Kay, 313, showed,—that if an appointment be made on a condition to be performed by the appointee, the appointment is good, but the condition bad. So,

Sugden on Powers, 526, 527;

Stuart v. Lord Castlestuart, 8 Ir. Ch. Rep. 408.

The question is, whether the appointees get less than the whole benefit of the trust property,

Askham v. Barker, 17 Beav. 37;

Alexander v. Alexander, 2 Ves. 640;

Wall v. Cheyke, 3 Sm. & Giff. 362.

As to the objection that the donee is precluded from exercising her discretion by will, it is clear that she could have released that discretion, and have bound herself not to execute the power,

Davies v. Huguessin, 1 Hem. & M. 730;

Smith v. Houlton, 26 Beav. 482.

They also cited and referred to

Graham v. Wickham, 1 De G. J. & S. 474;

Marsden's Trusts, 4 Drew. 594;

Topham v. Duke of Portland, 1 De G. J. & S. 517;

Ranking v. Barnes, 3 N. R. 660; 12 W. R. 567.

Hewitt v. Lord Dacre, 2 Keene, 622.

Sugden on Powers, 689, 690;

W. W. Cooper, for other parties in the same interest, cited,

Pryor v. Pryor, 12 W. R. 779; 33 L. J. Ch. 441;

Sadler v. Pratt, 5 Sim. 632.

Glasce, Q.C., for other children of Mrs. Field, commented on

Marsden's Trusts (*loc. cit.*);

Ranking v. Barnes (*loc. cit.*);

Rowley v. Rowley, Kay, 242;

Topham v. Duke of Portland (*loc. cit.*).

G. L. Russell, for representatives of a deceased child taking in default of appointment, contended that the appointment was bad. This was not a case where the appointment was good and the condition bad, but it was an attempt to do that by deed which could only be done by will,

Aleyn v. Belchior, 1 Eden, 132;

Reid v. Reid, 25 Beav. 469;

Burleigh v. Pearson, 1 Ves. 230.

He commented on

Marsden's Trusts (*loc. cit.*),

and drew a distinction between releasing a power and covenanting to exercise it in a particular way.

Baily, Q.C., in reply.

KINDERSLEY, V.-C., said: He had always considered these questions were originally determined by certain incontrovertible principles. One of these was, that where there was a power to appoint among children, whether by deed or will, it was a power in the nature of a trust, and no other consideration was to be entertained but the benefit of the children. Another principle was, that where a donor had given a power to appoint by will only, he must be considered to have done so designedly. Circumstances might arise to make it desirable to alter the distribution of

the shares among the children; one child might become bankrupt, another might inherit a fortune,—and the donee should retain the power of meeting these circumstances to the last moment. Again, where the donee of such a power was shown to be exercising it for the benefit of some person not the object of the power, such an appointment would not be upheld, even in the absence of a bargain so to exercise the power. Such having been the original propositions of the Court, he was sorry to say that there had been a gradual encroachment upon them. For example, it had been decided that the donee might fetter himself by covenanting not to execute the power. The Court had gone a step further, and had allowed the donee of the power to consent that a certain object of the power should not take less than a certain share thereunder. In the case of *Davies v. Huguesin* (*loc. cit.*), it had been held, not only that an appointment in pursuance of such a covenant was good, but that the covenant would prevail as against an appointment not consistent therewith. The decision was strong, but was perhaps the natural result of former encroachments. In the present case it might perhaps be said, that Mrs. Field had put herself into such a position that the appointment to Mr. J. Field was for the benefit of her estate; as, in the absence of such an appointment, her executors would be liable to an action on her covenant. Her intention plainly was, that, with the money purchased by this appointment, her son's debt should be paid. If it could be clearly shown that the appointment was wholly or in part for the benefit of Mrs. Field, it would be wholly vitiated. But in the case of *Stuart v. Lord Castlestuart* (*loc. cit.*), where the parent had become guarantee for the child, the appointment had been held good. This case had been approved of by Lord St. Leonards in his book on Powers, page 527, where he says—"The appointment was supported, for the father derived no benefit from it; there was no corrupt motive, and no fraud actual or constructive; for the debt was not his, but his son's, and the father's object was to prevent the injustice to his other children of having that which was not the testator's own debt paid out of his general property." Though he could not agree with this reasoning, he must be bound by the result, and must hold the appointment valid.

Kindersley, V.-C. } *In re LEEDS BANKING COM-*
11, 13 MARCH, 1865. } PANY. *Ex parte* BARRITT.

Joint-Stock Company—Contributory—Reserved Shares—Contract in Futuro—Misrepresentation.

A shareholder in a joint-stock company agreed, on the faith of a false report of the directors, to take reserved shares on which profits were not to accrue until a day before which the company was in process

of winding up. The shares were allotted, but no certificates issued:—

Held, that he was liable to be placed on the list of contributories in respect of these shares.

This was an adjourned summons to consider Mr. Barritt's liability to be placed on the list of contributories of the Leeds Banking Company in respect of twenty-two shares. The Leeds Banking Company was formed in 1832, with a nominal capital of 10,000 100*l.* shares, of which only 7,340 were at first issued; the issue of the remainder being left in the discretion of the directors. Of these original shares (on which 15*l.* was paid up), Mr. Barritt, in 1864, held fifty-five, and his liability in respect of them was not disputed.

The annual report of the directors for the year 1863, which was adopted at a general meeting of the company, and printed and sent in due course to all the shareholders, represented the bank to be in a flourishing condition, and in particular that the profits for 1863 were upwards of 44,000*l.* It was not suggested on the part of Mr. Barritt that the directors knew this to be a misrepresentation, but it was admitted by the official liquidator, not only that subsequent events had shown that the bank was, on the 31st of December, 1863 (the date down to which the accounts were taken), in an insolvent condition, but that a proper investigation of the books by the directors would have shown an obviously bad debt of 25,000*l.*, which ought to have been written off against the profits.

In June, 1864, the shares being at a high premium, the directors resolved to issue the reserved shares of 30*l.*, 15*l.* to rank as paid-up on the shares, and 15*l.* as a premium; and accordingly they sent to Mr. Barritt and all the other shareholders a circular offering them one new share for every five original shares held by them respectively, and inviting application for an additional number. The circular concluded with the following paragraph—

"If taken up, the amount must be paid to the bank on or before the 1st of October next (if paid before that time, interest at 5*l.* per cent. will be allowed), and the shares will then be entitled to one quarter's dividend at the end of the year."

Mr. Barritt accepted the eleven shares offered him by this circular, and applied for fourteen more, of which eleven were allotted to him. The circular in forming him in July of the allotment having been made contained the following passage—

"The amount to be paid to the bank on or before the 1st of October next, or the shares will be forfeited."

Mr. Barritt paid 660*l.* into the bank, and he received a reply which stated that the certificates would not be issued till the 1st of October.

The bank suspended payment on the 19th of September, 1864, and on the 24th a petition was presented, upon which ultimately a winding-up order was made.

Mr. Barritt denied his liability to contribute in respect of those twenty-two shares, on the grounds that he was led to take them by misrepresentation, and that the shares were not to be taken till the 1st of October, at which date the company was being wound up.

Glasse, Q.C., and *Kekewich*, for the official liquidator, argued that the report, being in accordance with the books, could not be said to be untrue; that, if it was untrue, the misrepresentation was not the inducement to the contract; nor was the company responsible for misrepresentation,

Brockwell's Case, 4 Drow. 205; reversed by

Nicol's Case, 3 De G. & J. 387;

Mixer's Case, 4 De G. & J. 575;

New Brunswick and Canada Railway Company v. Conybeare, 9 H. of L. Ca. 711, 725.

They insisted that the contract to take the shares was complete,

Bloxam's Case, 4 N. R. 7, 416.

Baily, Q.C., and *Wickens*, for Mr. Barritt.

The report was a gross misrepresentation of the state of the concern, caused by the negligence of the directors; and negligence is equivalent to fraud,

Ayre's Case, 25 Beav. 518.

Mr. Barritt swears that, but for the misrepresentation, he would not have taken the shares, and it is quite immaterial that the previous dividends might have led him to form a high opinion of the prospects of the bank. The company adopted the false report, and then sent it to the shareholders.

But, in fact, Mr. Barritt only agreed to become a partner in this concern on a day at which the partnership was no longer a going concern. The contract only had reference to a future transaction which never was or could be completed. In all the former cases the contract has been *in presenti*,

Yelland's Case, 5 De G. & Sm. 395; s. c. (on appeal) 16 Jur. 509;

Cookney's Case, 26 Beav. 6; 3 De G. & J. 170;

but here the shares did not exist at all. It was merely an arrangement among partners to be liable in different proportions as from a certain day; and the partnership must be wound up according to the proportions existing at the date of the winding-up,—that is, of the presentation of the petition,

25 & 26 Vict. c. 89, s. 84.

Glasse, Q.C., in reply.

KINDERSLEY, V.-C., said: The question whether Mr. Barritt ever contracted to be a new shareholder at all involved a new point; but, looking at the correspondence, he could not see anything which pointed to taking shares at a future time. There was a simple offer and acceptance of shares; and it did not follow, because special terms were introduced with respect to postponing profits, that the shares were not

to be taken *in presenti*. The use of the expression "forfeited" lent some slight weight to this view.

The other question was that of misrepresentation. His own view, if he were unfettered by authority, would be that if directors, in the exercise of their ordinary functions, made a false report to the company, who adopted it, and the report found its way into the hands of a person who took shares in the company, on the faith of it, he could not be held liable. The report of a joint-stock company was, in practice, a public document. He had decided *Brockwell's Case* (*loc. cit.*) on that principle; but it had been overruled, and it was now settled that, as to outsiders, a company was not liable for a false report unless it had been industriously circulated. He thought that that doctrine applied *a fortiori* to the case of a member of a company, for he was a party to the adoption of the report, and could not say that the company had made a misrepresentation to him. The sending of the printed report, after its adoption, to a shareholder, was not a circulation of it in the sense in which that word was used in the judgment of the Lord Chancellor in the *New Brunswick and Canada Railway Company v. Conybeare* (*loc. cit.*), for the company did not thereby affect to give any more knowledge than was contained in the directors' report, but only to give information of what the directors told the shareholders at the meeting.

On both grounds, therefore, he thought that Mr. Barritt's contention had failed, and he must be placed on the list in respect of the twenty-two new shares; but as this was a representative case, which had been selected to determine the position of a large class of shareholders, Mr. Barritt would have his costs out of the assets.

Stuart, V.-C. } WILLLOUGHBY v. BRIDGEOAKE.
8 MARCH, 1865. }

Purchase of Reversion—Improvident Bargain—Pressure—Family Arrangement.

Purchase of reversion by a father from his son, under alleged pressure, and at an alleged undervalue, upheld after the lapse of seventeen years.

Edwards v. Burt, 2 De G. M. & G. 55, commented on.

The plaintiff was, in 1847, entitled to one-fourth part of a legacy of 4000*l.* 3*l.* 10*s.* per cent. Annuities, in reversion expectant upon the death of his mother, who died in 1863. In 1847 the plaintiff was twenty-seven, and his mother sixty-seven years of age. Being in gaol for debt, the plaintiff in May, 1847, assigned his reversion to his father for 500*l.*

The deed recited the plaintiff's indebtedness and imprisonment, and stated the 500*l.* to be made up of 230*l.* already due to the father for advances, board, and lodging, since the plaintiff's majority (for which expenses, however, the plaintiff alleged that no charge

had ever been made either to him, or to his brothers or sisters), and of 270*l.* expressed to be paid, but which was not paid, on the execution of the deed. Some of the plaintiff's debts were paid, and he was released from prison; but this was done, as he alleged, not by his father, but by means of his mother's separate property. The evidence of actuaries was produced to prove that 500*l.* was below the value.

The plaintiff's father assigned the reversion over to Mrs. Brideoake in 1849, for 450*l.*; and the plaintiff, on the falling in of the reversion, filed this bill against Mrs. Brideoake's executors, and the trustees of the legacy, to be relieved from the assignment.

Bacon, Q.C., and *Rowcliffe*, for the plaintiff.

The onus of proving that full value was given, lies on the purchaser of a reversionary interest,

Gwland v. De Faria, 17 Ves. 20;

Edwards v. Burt, 2 De G. M. & G. 55;

Saller v. Bradshaw, 29 Beav. 161;

St. Albyn v. Harding, 27 Beav. 11;

Foster v. Roberts, 29 Beav. 467;

Jones v. Ricketts, 31 Beav. 130;

Peacock v. Evans, 16 Ves. 512;

and the defendants do not stand in any better position than the original purchaser,

Cockell v. Taylor, 15 Beav. 103, 118;

Bradwell v. Catchpole, 3 Sw. 78 n.

Malins, Q.C., and *Sargant*, for the executors of Mrs. Brideoake, and

Lonsdale, for the trustees of the legacy, were not called on.

STUART, V.-C., said: The bill by which the sale was impeached had not been filed until seventeen years after the sale had been made. The consideration expressed on the face of the deed consisted of 230*l.* in respect of money due for advances, board, and lodging, and 270*l.* money advanced at the time. It was said by the plaintiff that the 270*l.*, so far as it was paid at all, was paid out of money belonging to his mother for her separate use. As to that, the evidence was not quite clear; but, if it were so, it was a case when the son, twenty-seven or twenty-eight years of age, being in prison, and ripening into insolvency (in which event the assignees would take his property), the father, with the mother's money, properly came forward and redeemed him. It was said that the inadequacy of the consideration was proved by the evidence of actuaries and other persons who had estimated the value of the reversion. It appeared from tables produced in Court that the stock was in the month of the sale at 88, yet that circumstance had not been taken into consideration, but the estimate appeared to been made of 1000*l.* sterling.

The law on the subject of the purchase of reversionary interests had been referred to; and it was impossible to read without regret some of the later

authorities upon it. The decision of the Master of the Rolls in *Edwards v. Burt*, had been unfortunately reversed on appeal (2 De G. M. & G. 55), upon grounds which were very unsatisfactory, and which led to the absurd conclusion pointed out by the judgment of the Master of the Rolls in *Foster v. Roberts* (29 Beav. 467, 471), that a purchaser of a reversionary interest is not safe unless he gives more than the value. Lord St. Leonards also remonstrated against the recent cases on the subject (Sug. V. & P. 279 (14th ed.)).

It was unnecessary, however, to look further into the authorities as to the sufficiency of the price, for this was a transaction between father and son, and in such cases it was said in the same book (Sug. V. & P. 276) that "transactions between a father and son are treated as family arrangements, and not as dealings for reversionary interests: a fair arrangement between them would be supported, although made by a third party with a fraudulent intention of benefiting himself."

The intervention of the mother and her property seemed to him immaterial. The son had had the benefit of the arrangement for seventeen years, his father and mother were both dead, and on no ground was he entitled to set it aside.

The bill must be dismissed with costs.

STUART, V.-C. }
13 MARCH, 1885. } *Re HOOPER'S TRUST.*

Settlement—Covenant to Settle After-acquired Property—"At any time."

*A marriage settlement contained a covenant that property to which the wife then was, or she or the husband in her right should, at any time during the coverture, become entitled, to the value of 500*l.*, should be settled:—*

Held, that the covenant must be construed to affect only property of the prescribed value arising "at any one time, and from any one source."

This was an adjourned summons.

The marriage settlement of William Johnstoun Neale and Frances Herbert Nesbit contained a covenant by the intended husband and wife, that if F. H. Nesbit then was, or if, at any time during the then intended coverture, F. H. Nesbit, or W. J. Neale in her right, should become entitled by descent, transmission, claim, devise, bequest, gift, donation, representation, purchase, or otherwise, to any real or personal property, which should amount to or be equal in value to the sum of 500*l.*, for any estate or interest whatsoever, it should be settled upon the trusts of the settlement.

Mrs. Neale was, at the date of the settlement, absolutely entitled, in reversion expectant on the death of her mother, Mrs. Nesbit, who died in January, 1864, to a share of a sum of stock which was now represented by a sum of 211*l.* stock, standing to Mrs.

Neale's separate account, with liberty to apply in Chambers for payment. Mrs. Nesbit also left to Mrs. Neale by her will property to the amount of more than 500*l*.

W. Pearson, for Mr. and Mrs. Neale, now moved that the 211*l*. should be transferred to them, and cited, as to the meaning of the word "entitled,"

Wilton v. Colvin, 3 Drew. 617.

Crouch, for the children of the marriage, contended that the 211*l*. was bound by the covenant, which did not specify that the property, amounting to 500*l*. should come at one time, or from one source, according to the usual form,

3 Dav. Conv. 569, 570 (2nd ed.).

STUART, V.-C., said: The covenant clearly meant "at any one time from any one source," and that it could not be said that Mrs. Neale became entitled to the 211*l*. and her interest under the will at the same time. He, therefore, granted the motion, but without costs.

STUART, V.-C. } THE METROPOLITAN RAILWAY
13 MARCH, 1865. } COMPANY v. WODEHOUSE.

Injunction—Railway Company—Notice to Treat—Contract.

A landowner, after being served by a railway company with notice to treat, threatened to sell by auction the land comprised in the notice:—

Held, that the company were entitled to an injunction restraining the sale.

This was a motion to dissolve an injunction granted *ex parte* to restrain the defendant Wodehouse from proceeding to sell by auction certain houses in Finsbury.

On the 12th of February, 1865, the plaintiffs served the defendant with notice to treat for the houses. The defendant, on the 18th, replied, naming a price; but he advertised the houses for sale by public auction on the 14th of March; and the company, denying his right to sell them, filed a bill on the 4th of March, and on the 10th, obtained, *ex parte*, an injunction restraining the sale.

Druce, for the defendant, now moved to dissolve the injunction, arguing that the notice to treat did not constitute any contract on the defendants' part to sell to the plaintiffs,

Haynes v. Haynes, 1 Dr. & Sm. 426.

Malins, Q.C., and *Jessel*, for the plaintiffs, were not called on.

STUART, V.-C., said: The Vice-Chancellor Kindersley, in the very case cited for the defendant, said that "after the notice neither side could get rid of the obligation" (p. 450). This was just what the defendant was attempting to do—to evade the obliga-

tion imposed by the statute. The injunction must be continued, but he should not give the plaintiffs costs, because they had not interfered sooner to prevent the auction from taking place.

WOOD, V.-C. } GREENHALGH v. RUMNEY.
10 MARCH, 1865. }

Practice—Order of Revivor—15 & 16 Vict.
c. 86, s. 52.

Where the interest of the sole plaintiff has been transmitted to a person whose title can be disputed in the cause, no order of revivor can be made under 15 & 16 Vict. c. 86, s. 52.

Accordingly, where the sole plaintiff assigned his interest in the subject-matter of the suit before decree:—

Held, that such an order could not be made.

This was a suit instituted for the purpose of taking accounts of partnership property. The sole plaintiff had assigned all his interest in the subject-matter of the suit before decree.

The Registrar having declined to draw up the usual order to revive under the 15 & 16 Vict. c. 86, s. 52,

Beddoell mentioned the matter to the Court.

Under the old practice, when a sole plaintiff, suing in his own right, assigned his whole interest to another, the plaintiff being no longer able to prosecute for want of interest, and his assignees claiming by a title which might be litigated, the benefit of the proceedings could not be obtained by a supplemental bill, but must have been sought by an original bill in the nature of a supplemental bill—

Mitford's Pleadings, [65].

He cited,

Dendy v. Dendy, 5 W. R. 222, where Vice-Chancellor Wood held that an order to revive could not be obtained under the 15 & 16 Vict. c. 86, s. 52, by the devisee of a deceased plaintiff;

Williams v. Williams, 9 W. R. 296, where Vice-Chancellor Kindersley, following the decision in *Dendy v. Dendy* (*loc. cit.*), stated that, in his opinion, the Act did not apply in cases where a bill in the nature of an original bill was necessary;

Laurie v. Crush, 32 Beav. 118, where Romilly, M.R., followed these decisions, overruling—

Jackson v. Ward, 1 Giff. 80.

WOOD, V.-C., said: He was of opinion that the section did not apply in this case, as the assigns of the plaintiff claimed by a title which could be litigated in this very suit; and that, under the old practice, an original bill in the nature of a supplemental bill would have been necessary, and he accordingly refused to make the order.

Wood, V.-C. } MOSTYN v. EMMANUEL.
10 MARCH, 1865. }

Practice—Order of Revivor—15 & 16 Vict.
c. 86, s. 52.

Where, after the institution of a suit, the interest of a defendant has been transmitted to a person whose title cannot be disputed in the suit, an order can be made under 15 & 16 Vict. c. 86, s. 52.

Accordingly, where a suit had been instituted against

assignees in bankruptcy, and the bankruptcy had been annulled before decree:—

Held, that such an order could be made.

The bill in this cause had been filed against assignees in bankruptcy to execute the trusts of a settlement. The bankruptcy having been annulled before a decree was made, the Registrar declined to draw up the usual order under the 15 & 16 Vict. c. 86, s. 52.

Surragé mentioned the matter to the Court.

WOOD, V.-C., made the order, on the ground that the bankrupt's title could not be disputed in the cause.

EQUITY.

House of Lords. } JELlicoe v. GARDINER.
24 FEB., 14 MARCH, 1865. }

Present—THE LORD CHANCELLOR, LORD CRANWORTH,
and LORD CHELMSFORD.

Will, Construction—Shifting Clause—“Then Dead without Issue” — Acceleration of Remainders.

A testator devised estate Whiteacre to his son J for life, remainder to the first and other sons of J in tail male, remainder to the testator's son R for life, remainder to the first and other sons of R in tail male, remainder to first and other sons of J in tail general, remainder to first and other sons of R in tail general, remainder to testator's daughter E for life with remainders over. By a shifting clause, testator declared, that if estate Blackacre should, under a certain will, come to the possession of any of his sons or daughters, or any of their issue, being in possession of estate Whiteacre, then the person next in remainder under his will should be entitled to estate Whiteacre, for the estate thereby limited to him or her, as if the person so becoming possessed of estate Blackacre had died, or was then dead without issue. Testator's son J came into possession of estate Blackacre, and his sons were, by a decree in Chancery, declared not entitled to take estate Whiteacre under the limitation to them in tail male immediately succeeding the limitation to J:—

Held, affirming the judgment of the Court of Exchequer Chamber, that J's sons were not prevented from claiming estate Whiteacre under the remainder to them in tail general, subsequent to the remainders to testator's younger sons and their issue, in priority to testator's daughter E.

Quære, as to the correctness of the decree in Chancery.

This was an appeal from a judgment of the Court of Exchequer Chamber (reported 2 N. R. 458; 15 C. B. (N. S.) 171), affirming a judgment of the Court of Common Pleas (reported 12 C. B. (N. S.) 568), in favour of the respondent in an action of ejectment.

Sir James Gardiner, the testator in this cause, by his will, dated the 2nd of July, 1796, devised the Clerkhill Estate to certain trustees and their heirs upon trust to settle the same to the use of his eldest son James during his life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of James in tail male, with remainder to the use of testator's second son Robert for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of Robert in tail

male, with remainder to the testator's third son John M. Whalley for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of John M. Whalley in tail male, with remainder to the testator's afterborn sons successively in tail male, with remainder to the first and other sons of the testator's son James in tail general, with remainder to the first and other sons of Robert in tail general, with remainder to the first and other sons of John M. Whalley in tail general, with remainder to the first and other daughters of James in tail male, with remainder to the first and other daughters of Robert in tail male, with remainder to the first and other daughters of John M. Whalley in tail male, with remainder to the first and other daughters of James in tail general, with remainder to the first and other daughters of Robert in tail general, with remainder to the first and other daughters of John M. Whalley in tail general, with remainder to the testator's afterborn sons in tail general, with remainder to the testator's daughter Elizabeth Jane, the appellant, for life, with divers remainders over.

The will contained a shifting clause, which, after reciting that by the will of Sir William Gardiner certain estates, called the Gardiner Estates, were settled upon his the testator's brother, Sir John Gardiner, for life, with remainder to his first and other sons in tail male, with remainder to him the testator for life, with remainder to his first and other sons in tail male, with divers remainders over in favour of his issue, proceeded as follows—

“And whereas it is my will that the estates hereinbefore directed to be settled shall not be held or enjoyed so long as I may legally hereby prevent them, consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed to be limited shall take place and come into actual possession by any one of my sons or daughters, or his, her, or their issue, after such son or daughter, or such his, her, or their issue shall come into possession of the said [Gardiner Estates], but as often as such the last-mentioned estates shall come into the possession of any of my said sons or daughters, or any of their issue, that then the person next in remainder, according to the limitations hereinbefore mentioned and directed to be made, to my said estates, lands, tenements, and hereditaments, after the person or persons who shall so come to the possession of [the Gardiner Estates], shall be entitled to and come to the possession of [the Clerkhill Estates], for the estate and interest hereinbefore mentioned and directed to be limited to him or her respectively, and

so from time to time as often as this the event now in my contemplation may happen, in such manner and as if the person or persons so becoming possessed of the said [Gardiner Estates] had died or was then dead without issue, and the uses for which my said [Clerkhill Estates] are hereinbefore directed to be conveyed shall accordingly cease, determine, and shift from time to time, so as that the said two several estates [the Gardiner Estates] and [the Clerkhill Estates] may never, so long as I may legally prevent the same, consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed to be limited thereof shall take place and come into actual possession, be holden or enjoyed in possession by any of my sons or daughters, or his, her, or their issue together and at the same time, but on the contrary in manner and form herein above mentioned, and such clauses, provisoes, and declarations shall be inserted in such the settlement of my said estates hereinbefore directed to be made as shall be proper and necessary to effectuate my will and intention in these respects hereinbefore mentioned."

On the 19th of November, 1797, Sir John, the elder brother of the testator, died without issue, whereupon the testator entered into possession of the Gardiner Estates.

By a codicil to his will, dated the 7th of February, 1799, the testator, after reciting that he had become entitled for life to the Gardiner Estates, with remainder to his first and other sons in tail male, did thereby consistently with his will revoke and annul the limitations therein mentioned of the Clerkhill Estates in favour of his son James, it being still his will and intention that such estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, together with the Gardiner Estates.

The testator died in October, 1805, and thereupon his eldest son James (hereinafter called Sir James the younger) entered into possession of the Gardiner Estates as tenant in tail, and his second son Robert, then an infant, entered into possession of the Clerkhill Estates, who shortly after attaining majority, filed a bill in Chancery against his brother, Sir James the younger, and his children and the trustees of the will, praying for a declaration that he Robert was entitled to an immediate estate for life in the Clerkhill Estate, with remainder to his first and other sons in tail male, and that a proper conveyance should be executed by the trustees of the testator's will.

At the hearing of the cause on the 24th of May, 1813, Sir William Grant, the Master of the Rolls, made a decree in accordance with the prayer of the bill.

At the date of the decree Sir James the younger had issue two daughters and a son, who were parties to the suit, and shortly afterwards he had a second son, John Brocas, the respondent.

By an indenture dated the 21st of July, 1814, expressed to be made in pursuance of the above decree, and duly executed by the trustees of the will and all other necessary parties, the Clerkhill Estates were conveyed to the use of Robert during his life, without waste, with remainder to trustees to preserve &c., with remainder to the use of the first and other sons of Robert in tail male, with remainder in default of such issue to for and upon such other uses, trusts, and purposes, by the will of the testator declared concerning the Clerkhill Estates posterior to or to take effect in remainder or reversion after the estates thereby limited to Robert and his first and other sons in tail male, as in the events which had happened were then subsisting, or capable of taking effect.

Robert died without issue in November, 1840, whereupon his brother, John Masters Whalley, the third son of the testator, entered into possession of the Clerkhill Estate, and continued in such possession until his death, which occurred in October, 1861. John M. Whalley had no issue, and on his death the appellant, Elizabeth Jane Jellicoe, the eldest daughter of the testator, entered into possession, whereupon an action of ejectment was brought by the respondent, who had succeeded to the title on the death of his father, Sir James the younger, in 1851, his elder brother, James Whalley, having previously died without issue.

Sir James the younger had suffered a recovery of the Gardiner Estates, and the respondent became entitled to those estates by virtue of settlements made by him.

Sir Hugh Cairns, Q.C., Manisty, Q.C., and Udall, for the appellant, argued—

1st. That by virtue of the words "dead without issue," in the shifting clause, all descendants of Sir James the younger were excluded.

2nd. That the respondent was barred by the Statute of Limitations.

3rd. That the respondent had not, at all events, the legal estate in him.

They cited,

Carr v. Errol, 6 East, 58 ;

Doe v. Heneage, 4 T. R. 13.

The Attorney-General, Q.C., Mellish, Q.C., and Quain, for the respondent were not called upon.

14 MARCH, 1865.

THE LORD CHANCELLOR said : At the date of the will of Sir James Gardiner, the testator, the Gardiner Estates stood limited under the will of Sir William Gardiner, to Sir John Whalley Smythe Gardiner for life, remainder to his first and other sons in tail male, remainder to the use of Sir James, the testator, for life, remainder to his first and other sons in tail male, remainder to the first and other daughters of Sir John in tail male, remainder to the first

and other daughters' of Sir James in tail male, with divers remainders over. Under these limitations no female issue of any son of Sir James could take or inherit.

By the will of Sir James Gardiner, the testator, the Clerkhill Estates were devised to trustees in fee, upon trust to convey the same to the use of the testator's eldest son James for life; remainder to trustees to preserve contingent remainders, remainder to the first and other sons of James in tail male, remainder to the testator's son Robert for life, remainder to trustees to preserve contingent remainders; remainder to the first and other sons of Robert in tail male, remainder to the testator's third son, John Masters Whalley, for life, remainder to trustees to preserve; remainder to his first and other sons in tail male, remainder to every other son of the testator successively in tail male, remainder to the first and other sons of the testator's eldest son James in tail general, with similar remainders in tail general to the first and other sons of the second, third, and every other son of the testator in tail general, with remainder to the first and other daughters of the testator's first and every other son in tail male, with remainder to the use of Elizabeth Jane, the testator's eldest daughter, for life, with divers remainders over. This Elizabeth Jane is the present appellant.

Pausing for a moment and contrasting the limitations of these two wills, it is apparent that if James, the eldest son of Sir James the testator, had daughters and no son, such daughters would not take under the limitations of the Gardiner Estate, but would take the Clerkhill Estates severally and successively in tail male in remainder, anterior to the limitation to the appellant for life. Secondly, it is apparent that if the eldest son of the testator's first son James did not bar the entail, and died leaving daughters only, such daughters would take nothing under the limitations of the Gardiner Estates, but would inherit under the limitation in remainder of the Clerkhill Estates to their father in tail general.

We now come to the shifting clause contained in the will of Sir James. By that clause the testator (Sir James) declares his will and mind to be, that his devised estates should not be held or enjoyed by any one of his sons or daughters or his, her, or their issue after such son or daughter, or such his, her or their issue should have come into possession of the estates devised by the will of Sir William Gardiner, but that as often as the estates devised by the will of Sir William should come to the possession of any of his (Sir James's) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (Sir James's) will, should be entitled to his devised estates for the estate thereby limited to him or her; and so from time to time as often as the event might happen, in such manner and as if the person so becoming possessed of the Gardiner Estates had died or was then dead without issue.

It is plain from the first part of this clause that the word "issue" denotes and is limited to such issue as might take or inherit under the limitations of the Gardiner Estates, which would not include the daughters of Sir James's first son, or the female issue of a grandson. It is reasonable to put the same meaning upon the word "issue" in the subsequent phrase, "had died or was then dead without issue," for the testator plainly contemplates that the Gardiner Estates would be the supervenient estate, and that the shifting clause would be called into operation by the Gardiner Estate accruing under the will of Sir William Gardiner to some person taking the Clerkhill Estate under his own will; and as the guiding intent and object are to prevent unity of possession, the word "issue" ought not to be extended so as to include issue not capable of taking or inheriting under the limitations of Sir William Gardiner's will. But further it is the object of the clause to propel the Clerkhill Estates from the devisee who shall succeed to the Gardiner Estates, to the person next in remainder under the limitations of the Clerkhill Estates; and the words as if such devisee "had died, or was then dead, without issue," are used for this purpose, and denote the assumption or hypothesis necessary for effecting it; but it would be unreasonable to give the words a meaning beyond what is necessary for the intent and object with which they are used. So limited they denote such issue as would take under the limitations anterior to the devise to "the person next in remainder," and exclude them only from taking under those limitations.

I agree with one of the learned Judges in the Court below, that, but for Sir William Grant's decree, the words "had died or was then dead without issue," ought to be read as applicable distributively to the case of tenant for life and tenant in tail. But that construction is negated by the decree, inasmuch as the son of Sir James the younger was made a party to the suit, for the purpose of contending that, by reason of his father having succeeded to the Gardiner Estates, the Clerkhill Estate was propelled to himself as next in remainder; but it seems to have been decided, and apparently on the words "was then dead without issue," that the case must be treated as if Sir James the younger had died without leaving any issue inheritable under the limitation to his first and other sons in tail male; and, therefore, the words "was then dead without issue" were held to apply to the case of a tenant for life of the Clerkhill Estates becoming entitled to the Gardiner Estates. Accordingly, the decree declares Robert (being the second son of the testator, Sir James), to be entitled to have the Clerkhill Estates settled on himself for life, without impeachment of waste, save as in the will mentioned, with remainder to Robert's first and other sons in tail male, with such remainders over as are contained in the will of the testator, Sir James, with respect to the said estates; a declaration which expressly treats all

the estates limited by the will of Sir James the testator in remainder expectant on the estate of Robert, as valid and capable of taking effect; and, therefore, the estates in remainder, limited by the will to the first and other sons of Sir James the younger in tail general, and also the estates limited in remainder to the first and other daughters of Sir James the younger in tail male, are treated by the decree as still subsisting and capable of taking effect, which would not be the case, if, under the shifting clause, Sir James the younger must be considered as having died without issue, male or female.

The deed of release and settlement follows the decree, and converts the equitable life estate of Robert, and all other the estates limited by the will of Sir James the testator, in remainder thereon into legal estates. The point, therefore, now raised by the present appellant, is inconsistent with this decree, and with the deed of release which was settled in the Master's office under the direction of the Court.

The consequences of holding that the words "was then dead without issue" have a larger signification than what is required to pass on the Clerkhill Estate to the next devisee in remainder, would be very unreasonable. Thus, according to such construction, if Sir James the younger had daughters only, such daughters, although not inheritable to the Gardiner Estates, would be deprived of the power of taking the Clerkhill Estate under the express gift to the first and other daughters of Sir James the younger in tail male; and so also the first son of Sir James the younger would be deprived of the estate given to him in remainder in tail general, by which his female issue would lose the right to inherit the Clerkhill Estate, although they could never take the Gardiner Estates under the limitations in the will of Sir William. Thus express estates given by the will of Sir James, the testator, would be taken away and defeated by a construction put on the elastic word "issue" in the shifting clause not required for the object and proper operation of the clause, which ought not to be extended beyond its declared intent and purpose. I have examined with great care the learned and able judgment of Mr. Justice Williams, but I think the reasons for putting a limited meaning on the words "without issue" in the shifting clause predominate.

The other objections were faintly urged by the appellants, one founded on the Statute of Limitations, and the other on an allegation that the respondent had not the legal estate. With respect to the Statute of Limitations, the argument is at variance with the decree of Sir William Grant; for it must be founded on the construction that when the Clerkhill Estate passed from Sir James the younger as tenant for life, it vested in his eldest son James Whalley Smythe Gardiner, who died unmarried on the 11th of October, 1837, when the respondent's title accrued, being twenty years before the action of ejectment. But this is not

in accordance with the true construction; for the respondent claims under the limitation in remainder to the first and other sons of Sir James the younger in tail general. And with respect to the other suggested difficulty, it seems clear that the whole of the legal estate was conveyed by the trustees of Sir James the testator to uses correspondent with the trust estates declared by his will of the Clerkhill Estates in remainder expectant on the estate for life given to his second son Robert.

I therefore humbly move your Lordships to affirm the judgment, and to dismiss the appeal with costs.

THE LORDS CRANWORTH and CHELMSFORD concurred: and the judgment of the Court below was affirmed.

House of Lords. } ROBERTS v. BRETT.
13, 14 FEB. 16 MARCH, 1865. }

Present—THE LORD CHANCELLOR, LORD CRANWORTH, and LORD CHELMSFORD.

Contract—Condition Precedent—Mutual Covenants to Execute Bonds for the Performance of the Contract.

*A contracted with B "forthwith" to procure a vessel and lay it alongside a certain wharf, in order to ship a telegraphic cable, the property of B, for which A was to receive the sum of 5000*l.*, of which 1000*l.* was to be paid within seven days after the vessel should have been brought to the wharf. The agreement stipulated that each party should, within ten days from the date thereof, tender to the other a bond with sureties for the due execution of the contract. Neither party executed his bond, and B refused to allow A to proceed with the contract:—*

Held, that the execution of the bond by A was a condition precedent to his right to recover on the contract, and that he was not released from his obligation to tender a bond, by B not having tendered his bond.

The question whether a condition in an agreement is a condition precedent or not, is not to be determined solely by the wording of the agreement, but by the whole scope of the contract, and the apparent intention of the parties.

Error from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Common Pleas, in favour of the defendant, the respondent, on a demurrer.

This cause arose out of a contract by deed under which the appellant was to have laid down, for the sum of 5000*l.*, the African and Sardinian submarine telegraphic cable. The respondent however, the agent of the foreign company to whom the cable belonged, with whom the contract had been made, had refused to entrust it to the appellant, on the ground that he had failed to tender a proper bond with sureties, as stipulated by the contract. The appellant

insisted that the tender of such bond by him was not a condition precedent to the performance of the rest of the contract, and further that as the respondent was, under the contract, bound to tender a like bond to him, and had not done so, he was released from the obligation of tendering a bond.

The declaration, as originally framed, stated in substance, that, by an indenture made between the plaintiff, the appellant, of the one part, and the defendant, the respondent, of the other part, and bearing date the 15th of May, 1855, the appellant covenanted with the respondent that he the appellant should and would forthwith at his own expense procure the "Cornwall" frigate or some other suitable ship, and would (unless prevented by fire, tempest, or the Queen's enemies) stow, or cause to be stowed, on board such ship, a certain submarine telegraphic cable, 150 miles in length, then lying at Morden's Wharf, East Greenwich, and therein called the African and Sardinian cable; that the appellant further covenanted to provision and rig the vessel, to provide and pay competent officers crew workmen breaks and rollers &c. to lay down the cable; and would perform all such acts, and have the ship fully equipped and ready for sea at the Nore, on or before the 15th of July then next, with a proviso authorising the respondent to retain out of any moneys payable by him to the appellant under that indenture, the sum of 200*l.*, as liquidated damages, for every week during which the appellant should make default in having the ship so ready, from the said 15th of July. The declaration further stated that the respondent covenanted with the appellant that he would, subject to such right of deduction, pay the appellant the sum of 5000*l.*, in the manner therein mentioned, that is to say, "the sum of 1000*l.*, part thereof, on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's wharf, the sum of 2000*l.*, further part thereof, on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's wharf; and the sum of 2000*l.* when and so soon as the said ship should put to sea from the Nore." The declaration further stated, that by the same indenture it was further agreed that, "For the true performance of the covenant by the appellant thereinbefore contained, and for securing any penalties which he might incur under those presents, the appellant and two responsible sureties should *within ten days of the execution of those presents*, give and execute to the respondent, his executors and administrators, a bond in the penal sum of 5000*l.*; and that for the due performance of the covenants on the part of the respondent thereinbefore contained, the respondent and two responsible sureties should *within ten days from the execution of those presents*, give and execute to the appellant, his executors and administrators, a bond in the penal sum of 5000*l.*

Averment.—That the appellant did forthwith procure a suitable ship within the meaning of the contract,

and placed the same alongside the said Morden's wharf, and did rig out, &c., the said ship, and was ready and willing to place the cable on board the ship, and was also ready and willing to perform all the several acts covenanted to be performed by him. Averments of performance of all conditions precedent, &c., on the part of the plaintiff, of which the defendant had notice.

Breach.—That the defendant would not allow the cable to be stowed on board the ship, and did not nor would pay to the plaintiff the said sum of 5000*l.*, or any part thereof on account of the said contract.

Averment.—That whilst the said ship was lying alongside Morden's wharf, the respondent caused the cable to be stowed on board another ship other than the appellant's, and thereby broke his contract with the appellant, and discharged him from fully performing the same on his part; concluding with special damages.

5th plea.—That the appellant did not within ten days from the date of the execution of the said indenture, such ten days expiring before the said 15th of July, 1855, and before the time when the plaintiff placed the said ship so provided by him alongside the said Morden's wharf, or at any time give and execute, nor did he within such ten days or at any time procure two responsible persons or any responsible person as sureties or surety on his behalf to give and execute, nor did two responsible persons, nor did any responsible person, as such sureties or surety for the plaintiff, then or at any time give and execute to the respondent, his executors and administrators, a bond or bonds in the penal sum of 5000*l.* for the true performance by the appellant of the other covenants by the appellant in the said indenture contained.

Demurrer to the 5th plea.

The cause was argued, on this demurrer, before the Court of Common Pleas, on the 10th of June, 1856, when the Court unanimously gave judgment for the respondent, on the ground that the giving of the bond by the appellant was a condition precedent to his right to recover. The case is reported 18 C. B. 561.

From this judgment error was brought by the appellant, and the pleadings were amended. The declaration, as amended, instead of averring that the plaintiff brought the ship alongside Morden's wharf, alleged that the plaintiff was always ready and willing, according to the terms of the contract, to bring the ship alongside Morden's wharf for the purposes in the contract mentioned; but before the time arrived for so doing according to the terms of the contract, the respondent refused to perform the contract on his part, and dispensed with the vessel being brought alongside the wharf. This averment was inserted just before the allegation of the appellant's performance of all conditions precedent.

The breach also was altered, so far, that the breach that the defendant would not stow the cable

remained, but the residue of the breaches were struck out, and instead thereof were inserted breaches that the respondent wholly refused to perform the contract, and that the respondent did not, within ten days from the execution of the contract, give any bond with sureties.

In the amended pleadings, the plea demurred to became the fourth; but it was not otherwise altered or amended.

The case was argued before the Exchequer Chamber, on the 16th of May, 1859, when the Court, without calling upon the defendant, unanimously affirmed the judgment of the Court below. See 6 C. B. (N. S.) 611.

Bovill, Q.C., Massy Dawson, and Beasley, for the appellant.

1st. The execution of the bond by us was not a condition precedent to the performance of the rest of the contract, as the covenant to give the bond only went to part of the consideration: the covenants to give the bonds were mutual, but independent covenants,

Pordage v. Cole, 1 Wms. Saund. 320, c. n. 3;

Stavers v. Curling, 3 Bing. N. C. 355;

Boone v. Eyre, 1 H. Black. 273 n.

[THE LORD CHANCELLOR.—Does not the question, whether a condition is precedent or not, depend on the wording, and not on the matter of the contract?]

Not so. If the neglect of a stipulation would frustrate the whole object of the contract, that is a ground for holding such stipulation a condition precedent,

Tarrabochia v. Hickey, 1 H. & N. 183;

Kingdon v. Cox, 2 C. B. 661;

Clipsham v. Vertue, 5 Q. B. 265;

Campbell v. Jones, 6 T. R. 570;

Matlock v. Kinglake, 10 Ad. & E. 50;

Dicker v. Jackson, 6 C. B. 103.

The facts show that the giving of the bond by us was not intended to be a condition precedent. We were bound to bring the ship "forthwith," that is, immediately, to Morden's wharf. We might have done so the day after the contract was signed, if so, we should have been entitled to receive 1000*l.* at the end of seven days from that, three days before the time for tendering the bond had elapsed. There is no allegation by the respondent, that he entered into the contract on the faith of the bond being executed by us.

2nd. We allege on our pleadings a positive breach by the respondent, before the time arrived for the execution of the bond by the appellant; and the respondent does not show on his pleadings that our neglect to execute the bond preceded any breach of the contract by him,

Hochster v. Delatour, 2 El. & Bl. 678;

Lovelock v. Franklyn, 8 Q. B. 371;

Cort v. Ambergate Railway Company, 17 Q. B. 127.

They distinguished

Ellen v. Topp, 6 Exch. 424;

and

Graves v. Legg, 9 Exch. 709.

They also cited,

Belm v. Burness, 8 L. T. (N. S.) 207;

2 Smith's Leading Cases, 11, notes;

Short v. Stone, 8 Q. B. 358.

Mellish, Q.C., and *Horace Lloyd*, for the respondents.

1st. The question whether the tender of the bond is a condition precedent or not, is one of construction to be determined by looking at the whole intention of the parties as well as the strict letter of the contract. If the bond is not a condition precedent, our whole object is frustrated. The company to whom the cable belonged, never intended to part with an article so valuable and so liable to injury as the cable, until they had substantial security,

Avery v. Bowden, 5 El. & Bl. 714.

2nd. The declaration alleges that the appellant had performed all conditions precedent; that includes the execution of the bond; the plea traverses that, and is a good plea.

They also commented on

Hochster v. Delatour (*loc. cit.*).

Massy Dawson, in reply, cited, on the question of the pleading,

Bentley v. Davies, 9 Exch. 666.

16 MARCH, 1865.

THE LORD CHANCELLOR, in moving that the judgment of the Court below be affirmed, said, that the question was whether, having regard to the provisions of the contract and the nature of the subject-matter, the stipulation as to the giving of the bond by the appellant was a condition, the previous fulfilment of which, unless waived by the respondent, was necessary to enable the appellant to maintain an action. First, looking to the subject-matter of the contract, it was reasonable to suppose that the company did not intend to part with so valuable an article as the cable without receiving substantial security. The requisition of the bond within ten days was enough to show that the execution of the bonds must precede any material action under the contract. The appellant urged that if he had taken the ship to Morden's wharf at once, he would have been entitled to 1000*l.* within one week, and before the time for tendering the bond had expired. His Lordship could not think that such expedition, if it were in fact possible, was within the contemplation of the parties. "Forthwith" did not necessarily imply that the ship was to be procured before the bonds were executed—i.e., before ten days had elapsed; but if the appellant had been so expeditious as to have brought the ship to Morden's wharf next day, and had been entitled to 1000*l.* within ten days, that would not have affected his liability to give

the bond. He was still bound to tender his bond, as the right to the sureties was very material to the company. It had been argued that the covenants were mutual, and that there was no default by the appellant till there was a like default by the respondent, and that, therefore, the respondent could not defend himself. He could not accede to that argument. The engagements to give the bonds were not given in consideration of each other; the execution of the bond by each party was a condition precedent to his recovering on the contract. If either party did not give his bond, both might in effect be released, but neither could sue until he had given his bond.

LORD CRANWORTH agreed that the giving of the bond must have been intended to be a condition precedent to any action under the contract. It had been argued that the circumstance of the bonds being given within ten days was inconsistent with that view, as a breach of the contract might have occurred within the ten days, if the appellant had brought the ship round at once. But that was not so in reality, as the party entitled to take advantage of such breach would have first to tender his own bond, and so put himself in a position to sue.

LORD CHELMSFORD said, that the question was, whether the tender of the bond by the appellant was a condition precedent to his right to recover. It was contended on his behalf that the case came within the third rule laid down in the notes to *Pordage v. Cole* (*loc. cit.*). But those rules were not intended to contain fixed and immutable regulations—they were merely intended as general guides to decisions: the question was, what was the intention of the parties on the whole contract. The respondent said, "In consideration of your doing certain acts, and giving me a bond with sureties to enforce your doing them properly, I will pay you 5000*l.*, and give you sureties to secure my doing so." The appellant said, "In consideration of your paying me 5000*l.*, and giving me a bond with sureties to enforce your making the payment, I will do certain acts, and give you sureties to secure my doing them properly." Under those circumstances, either party was clearly entitled to refuse to go on with the contract till he had a bond from the other party. Too much stress had been laid by the appellant on the word "forthwith." The appellant was not bound to proceed until he had the respondent's bond. If he acted on the agreement within the ten days, and before getting the respondent's bond, he would proceed at his own peril. His Lordship then remarked that the stipulations for bonds came at the end of the deed, and were obviously intended to be mutual securities for the performance of all the provisions of the contract. Nothing could be made for the appellant out of the non-delivery of the bond by the other party: the agreement was simply at an end, neither party being in a position to sue. The present decision

would not be affected by the supposed case of one party being allowed to go on with his part of the contract, as it was perfectly clear that one who allowed the other party to go on would have waived his right to insist on the performance of a condition precedent. The judgment would be affirmed.

Privy Council. }
14, 15, 16, 19 DEC. 1864. } Re THE LORD BISHOP
20 MARCH, 1865. } OF NATAL.

Present — THE LORD CHANCELLOR, LORD CRANWORTH, LORD KINGSDOWN, DEAN OF THE ARCHES, and THE MASTER OF THE ROLLS.

Colonial Church—Metropolitan and Suffragan—Letters Patent—Right of Crown to Create Ecclesiastical Corporation—Right of Appeal to Privy Council.

The Crown by letters patent created in a colony having legislative institutions a metropolitan see and province, and conferred upon the bishop thereof metropolitan authority over the bishop of a neighbouring colony (also having legislative institutions of its own), who took the oath of canonical obedience to the metropolitan as his suffragan:—

Held, that in a colony having legislative institutions there was no power in the Crown by virtue of its prerogative (independent of statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status, rights, and authority the colony could be required to recognise:

Held also, that in such a colony no metropolitan or bishop could by virtue of the Crown's letters patent alone (unless granted under an Act of Parliament or confirmed by a colonial statute) exercise any coercive jurisdiction or hold any court or tribunal for that purpose, and that, therefore, a sentence of deprivation pronounced by the metropolitan against one of his suffragan bishops was null and void:

Held also, that there was no consensual jurisdiction, for it was not competent for the one bishop to give or the other to exercise any such jurisdiction.

It was contended in argument, that if the bishop had no jurisdiction, and his judgment was a nullity, no appeal could lie to the Queen in Council:—

Held, that, under 25 Hen. 8, c. 19, an appeal would lie.

This was an appeal from a sentence of the Bishop of Cape Town, published and promulgated in the Diocese of Natal, wherein the Bishop of Cape Town, as metropolitan created by letters patent, pronounced deprivation against the Bishop of Natal, one of his suffragan bishops.

On the 25th of September, 1847, letters patent were issued by the Crown, erecting the colony or settlement

of the Cape of Good Hope and its dependencies, and the island of St. Helena, into a bishop's see or diocese, and appointing Dr. Gray to be ordained and consecrated bishop of the see. Dr. Gray having been duly consecrated by the Archbishop of Canterbury, went out to the Cape to assume the duties of his office, and continued to discharge them till the latter end of the year 1853. It being then considered by the Queen's Government that the then diocese of Cape Town was too extensive for one bishop, and that it would be advisable to divide it into three dioceses, to be called Cape Town, Graham's Town, and Natal, with a view to this arrangement Dr. Gray, on the 23rd of November, 1853, resigned his bishopric into the hands of the Archbishop of Canterbury, by whom the resignation was accepted, and Dr. Gray ceased to be Bishop of Cape Town. On the 8th of December, 1853, other letters patent were issued, by which Dr. Gray was appointed Bishop of Cape Town, and also metropolitan. These letters patent recited, among other things, that it had "been represented to Her Majesty by the Archbishop of Canterbury that the then existing see or diocese of Cape Town was of inconvenient extent, and that for the due spiritual care and superintendence of the religious interests of the inhabitants thereof, and for the maintenance of the doctrine and discipline of the United Church of England and Ireland within the colony of the Cape of Good Hope and its dependencies, and the island of St. Helena, it was desirable and expedient that the same should be divided into three (or more) distinct and separate sees or dioceses, to be styled the 'Bishopric of Cape Town,' the 'Bishopric of Graham's Town,' and the 'Bishopric of Natal'—the bishops of the said several sees of Graham's Town and Natal and their successors to be subject and subordinate to the see of Cape Town and to the bishop thereof and his successors, in the same manner as any bishop of any see within the province of Canterbury was under the authority of the archiepiscopal see of that province and the archbishop of the same;" and the letters patent contained the following passages—

"And we do further will and ordain that the said Right Reverend Father in God, Robert Gray, Bishop of the said See of Cape Town, and his successors the bishops thereof for the time being, shall be, and be deemed and taken to be, the metropolitan bishop in our colony of the Cape of Good Hope and its dependencies, and our island of St. Helena, subject, nevertheless to the general superintendence and revision of the Archbishop of Canterbury for the time being, and subordinate to the archiepiscopal see of the Province of Canterbury: and we will and ordain that the said bishops of Graham's Town, and Natal, respectively, shall be suffragan bishops to the said Bishop of Cape Town and his successors. And we will and grant to the said Bishop of Cape Town and his successors full power and authority as metropolitan of the Cape of

Good Hope, and of the Island of St. Helena, to perform all functions peculiar and appropriate to the office of metropolitan within the limits of the said sees of Graham's Town, and Natal, and to exercise *metropolitan jurisdiction* over the bishops of the said sees and their successors, and over all archdeacons, dignitaries, and all other chaplains, ministers, priests, and deacons in holy orders of the United Church of England and Ireland within the limits of the said dioceses. And we do by these presents give and grant unto the said Bishop of Cape Town and his successors full power and authority to visit once in five years, or oftener if occasion shall require, as well the said several bishops and their successors, as all dignitaries and other chaplains, ministers, priests, and deacons in holy orders of the United Church of England and Ireland resident in the said dioceses, for correcting and supplying the defects of the said bishops and their successors, with all and all manner of visitatorial jurisdiction, power, and coercion.

"And we do hereby authorise and empower the said Bishop of Cape Town and his successors to inhibit during any such visitation of the said dioceses the exercise of all or of such part or parts of the ordinary jurisdiction of the said bishops, or their successors, as to him the said Bishop of Cape Town, or his successors, shall seem expedient, and during the time of such visitation to exercise by himself or themselves, or his or their commissaries, such powers, functions, and jurisdictions in and over the said dioceses as the bishops thereof might have exercised, if they had not been inhibited from exercising the same.

"And we do further ordain and declare that if any person against whom a judgment or decree shall be pronounced by the said bishops or their successors, or their commissary or commissaries, shall conceive himself to be aggrieved by such sentence, it shall be lawful for such person to appeal to the said Bishop of Cape Town or his successors, provided such appeal be entered within fifteen days after such sentence shall have been pronounced.

"And we do give and grant to the said Bishop of Cape Town and his successors full power and authority finally to decree and determine the said appeals.

"And we do further will and ordain that in case any proceeding shall be instituted against any of the said bishops of Graham's Town and Natal, when placed under the said metropolitan see of Cape Town, such proceedings shall originate and be carried on before the said Bishop of Cape Town, whom we hereby authorise and direct to take cognisance of the same. . . .

"And if any party shall conceive himself aggrieved by any judgment, decree, or sentence pronounced by the said Bishop of Cape Town or his successors, either in case of such review, or in any cause originally instituted before the said bishop or his successors, it shall be lawful for the said party to appeal to the said

Archbishop of Canterbury or his successors, who shall finally decide and determine the said appeal."

The letters patent which constituted the see of Natal, and appointed the appellant to that see, were sealed, and bear date on the 23rd November, 1853, fifteen days before the grant of the letters patent to the Bishop of Cape Town.

The letters patent creating the see of Natal recited the patent of September, 1847, which created the original diocese of Cape Town, and appointed Dr. Gray the bishop thereof, and that he had since resigned the office of Bishop of Cape Town, whereby the said see had become and was then vacant. The patent also recited that it was expedient and desirable that the said diocese should be divided into three or more distinct and separate dioceses, to be styled the bishoprics of Cape Town, Graham's Town, and Natal, the bishops of the said several sees of Graham's Town and Natal to be subject and subordinate to the see of Cape Town and the bishop thereof, and his successors, in the same manner as any bishop of any see within the Province of Canterbury was under the authority of the archiepiscopal see of that province and the archbishop of the same; and the letters patent proceeded to erect, found, make, ordain, and constitute the district of Natal, to be a distinct and separate bishop's see and diocese, to be called the Bishopric of Natal. And after appointing Dr. Colenso to be the bishop of that see, and granting that the Bishop of Natal and his successors should be a body corporate, the letters patent contained the following passage—

"And we do further ordain and declare that the said Bishop of Natal and his successors shall be subject and subordinate to the see of Cape Town, and to the bishop thereof and his successors, in the same manner as any bishop of any see within the province of Canterbury, in our kingdom of England, is under the authority of the archiepiscopal see of that province, and of the archbishop of the same: and we do hereby further will and ordain that the said John William Colenso, and every Bishop of Natal, shall, within six months after the date of their respective letters patent, take an oath of due obedience to the Bishop of Cape Town for the time being, as his metropolitan, which oath shall and may be ministered unto him by the said archbishop, or by any person by him duly appointed or authorised for that purpose."

The letters patent then proceeded to confer on the Bishop of Natal and his successors episcopal jurisdiction and authority over all rectors, curates, ministers, chaplains, priests, and deacons, within the diocese, and directed that, if any party should conceive himself aggrieved by any judgment, decree, or sentence pronounced by the Bishop of Natal or his successors, he should have an appeal to the Bishop of Cape Town, who should finally decide and determine the appeal.

Under these letters patent, the appellant was consecrated on the 30th of November, 1853, and he took an oath of canonical obedience to the Metropolitan Bishop of Cape Town, which oath was administered to him by the Archbishop of Canterbury, and was in these words:—"I, John William Colenso, Doctor in Divinity, appointed Bishop of the See and Diocese of Natal, do profess and promise all due reverence and obedience to the Metropolitan Bishop of Cape Town, and to his successors, and to the Metropolitan Church of St. George, Cape Town." At this time there was not in reality any Metropolitan See of Cape Town, or any bishop thereof, in existence.

These several letters patent were not granted in pursuance of any orders or order made by her Majesty in Council, nor were they made by virtue of any statute of the Imperial Parliament, nor were they confirmed by any Act of the Legislature of the Cape of Good Hope or of the Legislative Council of Natal.

Previously to these letters patent being granted, the district of Natal had been erected into a distinct and separate government; and, by letters patent granted by the Crown in 1847, it was ordained that Natal should have a Legislative Council; and that such Council should have power to make such laws and ordinances as might be required for the peace, order, and good government of the district. With respect to the Cape of Good Hope, by letters patent dated the 23rd of May, 1850, it was declared and ordained by her Majesty that there should be within the settlement of the Cape of Good Hope a Parliament, which should be holden by the Governor, and should consist of the Governor, a Legislative Council, and a House of Assembly; and that such Parliament should have authority to make laws for the peace, welfare, and good government of the settlement.

In the year 1863, certain charges of heresy and false doctrine were preferred against the appellant before the Bishop of Cape Town as metropolitan, and, upon these charges, the Bishop of Cape Town, claiming to exercise jurisdiction as metropolitan, did, on the 16th day of December, 1863, sentence, adjudge, and decree the appellant, the Bishop of Natal, to be deposed from his office as such bishop, and to be further prohibited from the exercise of any divine office within any part of the metropolitan province of Cape Town. In pronouncing this decree, the Bishop of Cape Town claimed to exercise jurisdiction as metropolitan by virtue of his letters patent, and of the office thereby conferred on him, and as having thereby acquired legal authority to try and condemn the appellant; and the appellant protested against such assumption of jurisdiction.

This sentence and decree of Dr. Gray as metropolitan was published and promulgated in the diocese of Natal, and the clergy of that diocese were thereby prohibited from yielding obedience to the appellant as Bishop of Natal.

W. M. James, Q.C., and Fitzjames Stephen (J. Westlake and E. Charles, with them), for the petitioner, contended—

That the letters patent under which the Bishop of Cape Town had acted in depriving Bishop Colenso were void, because—

1st. These letters patent claimed to establish a Court of criminal jurisdiction in a country which already possessed a constitutional government; this they could not do,

Bacon's Abridgment, Prerogative, B. 3;

Comyns' Digest, Prerogative, D. 28;

and the office of the Bishop of Natal was created for life under the letters patent, and could, therefore, only be determined by a *scire facias*, or a conviction for a criminal offence by a Court of competent jurisdiction,

Comyns' Digest, Officer, K. 11;

Elton College Case, 8 El. & Bl. 610;

Long v. Bishop of Cape Town, 9 Jur. (N.S.) 805.

2nd. Because the Crown was unable, by patent, to create a Court with ecclesiastical jurisdiction.

By the 1 Eliz. c. 1, ss. 17, 18, power was given to the Crown to create the Court of High Commission, which was destroyed by the subsequent statutes,

16 Car. 1, c. 11, ss. 3, 4;

13 Car. 2, c. 12, s. 2;

and although the statute of Charles the First did not touch section 17 of the statute of Elizabeth, and the statute of Charles the Second revived the ordinary jurisdiction of ecclesiastical authorities, they both provided against any power remaining in the Crown to establish a High Commission Court, or any Court having ecclesiastical jurisdiction. Historically, in all cases where ecclesiastical jurisdiction had been created, it had been by statute,

Elton College Case, *loc. cit.*;

31 Hen. 8, c. 9;

Bowerbank v. Bishop of Jamaica, 11 Moo. P. C. C. 449.

3rd. Because the Crown could not delegate its power by giving a final appeal to the Archbishop of Canterbury.

4th. Because the letters patent of the Bishop of Cape Town interfered with the right of appeal to the Crown, granted by the patent of Bishop Colenso.

The expression in the patent of the Bishop of Natal, that he should be "subject and subordinate to the Bishop of Cape Town, in the same manner as a suffragan bishop of the province of Canterbury was subject and subordinate to the archbishop of the diocese," proved that he was to be under the Bishop of Cape Town, with the right of appeal to the Queen in Council. It was not by the subsequent letters patent of the Bishop of Cape Town, but by those which he himself received, that the rights of the Bishop of Natal must be determined.

As to the contract, which was alleged by the respondent's case to have been entered into between the

Bishops of Cape Town and Natal, admitting the existence of a contract, what was agreed upon was, that the ecclesiastical affairs in the colony should be regulated in accordance with the practice of the Church of England, and be governed by the laws of England. But it was no part of the Bishop of Natal's contract with the Queen—for it must be remembered that the Queen was one of the parties to the contract both with the Bishop of Cape Town and the Bishop of Natal, that he should become a member of a schismatical church of South Africa, such as had been attempted to be established by the Bishop of Cape Town. The letters patent of the Bishop of Natal were granted at a time when the see of Cape Town was vacant, and before the grant of the letters patent to the Bishop of Cape Town, wherein it was stated that an appeal would lie to the Archbishop of Canterbury. The Bishop of Natal, at the time he took the oath of canonical obedience to the Bishop of Cape Town, had no knowledge of the contents of the letters patent of the latter, such provisions, therefore, could form no part of the contract. Therefore the effect of the contract was, that the Bishop of Natal stood exactly in the same position towards the Bishop of Cape Town as a suffragan bishop of the province of Canterbury to the archbishop of the diocese. That could not mean that he was subject to be deprived by him without appeal. There was this distinction between the present case and *Long v. Bishop of Cape Town* (*loc. cit.*) that there Mr. Long had obtained his office from the bishop himself, who had nothing whatever to do with the appointment of Dr. Colenso.

No bishop in England could be tried for heresy or any other offence, except by Queen's Royal Commission, the archbishop had no such jurisdiction. The power which was formerly exercised by the Pope was now vested in the Crown,

24 Hen. 8, c. 12;

1 Eliz. c. 1, ss. 17, 18;

Chron. of Battle Abbey, 91;

Hen. 8, Articles of Faith, tit. Prerogative;

Archbishop Cranmer, Reformation, 200;

2 Fox's Martyrs, 71; cases of *Bonner* and *Gardiner*;

Viner's Abridgment, tit. Prerogative, G. F. 2;

1 Hook's Lives of the Archbishops, 159;

1 Bingham's Antiq. 212;

2 Spelman's Councils, 3;

Fox's Acts and Monuments, 168;

Watson's Cler. Law, c. 6, pp. 56, 57 (ed. 1747);

11 State Trials, 1123; case of *Dr. Compton*;

Regina v. Archbishop of Canterbury, 1 El. & El. 545;

3 & 4 Vict. c. 86, s. 23.

The only case against the right to appeal was

Lucy v. Watson, 1 Ld. Raym. 539;

for in

Bishop of Clogher's Case, Ann. Reg. 1832,

the archbishop acted in his visitatorial capacity. And in *Lucy v. Watson* (*loc. cit.*), the Bishop of St. David's never objected to the archbishop's jurisdiction, who accord-

ingly tried and convicted him. From that decision the bishop appealed to the King to issue a Commission of Delegates, which was about to be done when, finding they were likely to confirm the archbishop's sentence, he applied to the Court of Queen's Bench for a prohibition. That Court refused to interfere. The case was taken before the House of Lords on the question of privilege, which was finally disallowed. As the case stood, the decision of the commission, in reference to which the Court of Queen's Bench refused to interfere, must be held to be operative. But it was of no consequence where the jurisdiction began, if there were a final appeal. If the Bishop of Cape Town had no such jurisdiction as he assumed, the proceedings must be quashed; if he had jurisdiction it could have been only subject to appeal to the Queen in Council, and they must be reviewed.

They also cited,

Caudrey's Case, 3 Rep. xl;

Coke's 4th Inst. 339;

3 Hooker Ecc. Pol. 256, 432 (2nd ed.);

2 State Trials, 463;

7 Comyns' Digest, tit. Visitor, 544;

26 Hen. 8, c. 1;

In the Matter of the Justices of the Supreme Court of Bombay, 1 Knapp, 1;

In the Matter of the Court of Guernsey, 5 Moo. P. C. C. 49;

Re Bedard, 7 Moo. P. C. C. 23;

Re Cape Breton, 5 Moo. P. C. C. 259;

3 & 4 Will. 4, c. 85, § 94;

59 Geo. 3, c. 60, § 4;

15 & 16 Vict. c. 52;

15 & 16 Vict. c. 88;

16 & 17 Vict. c. 49;

Case of Archbishop Abbot, 2 St. Tr. 1150.

The Queen's Advocates and Sir H. Cairns (E. Badeley with them), for the respondent, argued, that the case would be found to comprise three main points—

1st. Had the Bishop of Cape Town jurisdiction to try Dr. Colenso for heresy, and deprive him? The jurisdiction might be either coercive or consensual. In *Long v. The Bishop of Cape Town* (*loc. cit.*), it was decided, mainly on the authority of *Campbell v. Hall* (1 Cooper, 204), that there was no positive or coercive jurisdiction. The present case differed, however, from that, and was taken out of the authority of *Campbell v. Hall*, by the fact that Natal was a conquered colony, and therefore the Crown, by its prerogative, had the right to make laws for it. It was not till 1856 that representative institutions were given to Natal, and the letters patent were granted in 1853: the Crown, therefore, had authority to make the provisions in the letters patent matters of positive and coercive enactment.

Next, as to consensual jurisdiction, it was clear that, as a matter of contract under the operation of his letters patent, the Bishop of Natal had subjected himself to the

Bishop of Cape Town, in the same way that a suffragan bishop of the province of Canterbury was subject to his metropolitan. The whole point, indeed, was comprised in the question, Has the Archbishop of Canterbury power to deprive his suffragan for heresy? No cases had been cited on the other side which proved that he had no such power. The cases of *Bonner* and *Gardiner* (*loc. cit.*) were tried under 26 Hen. 8, which had since been repealed. The case of *Archbishop Abbot* (*loc. cit.*) was tried under the High Commission Court. It was contended, on the other side, that the Crown might appoint a commission to try a bishop for heresy; but the power to issue such commissions was entirely destroyed by the statutes abolishing the High Court of Commission.

On the other hand, it was clearly established by the cases of

Lucy v. Watson, *loc. cit.*,

and

Bishop of Clogher's Case, *loc. cit.*,

that it was in the power of the archbishop, as metropolitan, to deprive a suffragan bishop.

On this point they also cited,

Lindwood's Provinciale, B. i. tit. 34;

Aylyffe's Parergon, 92;

1 Gibson, 133;

Dean of York's Case, 2 Q. B. 36;

Book of Assignations, 1636-7, 137;

D'Oyly's Life of Archbishop Sancroft, 193;

Poole v. Bishop of London, 14 Moo. P. C. C. 262;

Dr. Warren's Case, *Grindrod's Compendium*, 408.

2nd. Whether, at this stage, the Crown had an appellate jurisdiction?

Supposing that it were granted that the Bishop of Cape Town had no jurisdiction whatever, coercive or consensual, that there was no Court, no trial, no sentence—that the whole proceeding was null and void—how, then, could there be any appeal? It might be said, that, in the present instance, harm had been done, and that some remedy for the injury ought to be provided; but, if such were the state of the case, Dr. Colenso had the power of instituting proceedings, such as had been instituted by Mr. Long in *Long v. Bishop of Cape Town* (*loc. cit.*); and the locale for such proceedings would be the regular Courts of Natal, or it might be Cape Town: from them there would be an appeal to the Privy Council, as there was in *Long v. Bishop of Cape Town*; but there was no direct appeal. Should the Bishop of Natal allege that he was injured by the letters patent of the Bishop of Cape Town, on the ground that they were inconsistent, and interfered with his rights under his own letters patent, his remedy was to take proceedings in this country by *scire facias*.

But, assuming that coercive jurisdiction was given by the letters patent of the Bishop of Cape Town, the authorities which established that jurisdiction could

prescribe the channel in which an appeal should flow. It had, in fact, done so in the letters patent; and from them the course to be pursued must be learnt. Now the letters patent of Dr. Colenso pointed out a *judex*—viz., the Bishop of Cape Town; a Court—viz., the Metropolitan Court of Cape Town; and a proper mode of appeal—viz., to the Archbishop of Canterbury. It was said, however, that this was inconsistent with the second letters patent to the Bishop of Cape Town constituting him metropolitan, as the appeal to Canterbury was inconsistent with metropolitan jurisdiction. There was, however, no such inconsistency: the object of the letters patent of Dr. Colenso was to point out the Judge and Court, by which he was to be immediately controlled, the second letters patent supplied what was avowedly left open in the first, and decided the course of appeal. They were willing to concede, that if an appeal in the present instance had been made to the Archbishop of Canterbury, the other side might fairly quote the 25 Hen. 8, c. 19, s. 4, in support of a further appeal to the Crown. But if those Courts, and that chain of appeal, had not been regularly constituted, if, as the appellant seemed to contend, the whole proceeding was nugatory and *ultra vires*, that was not the tribunal to which one of Her Majesty's subjects should come, who felt himself aggrieved by an utterly unfounded assumption of judicial authority. There had been no ground for action, if the whole proceeding was a farce; and if a civil injury had been done, the Civil Courts were open. If one who was no Judge affected to try and sentence another, in what was no Court, by what was no judicial process,—whatever might be the remedy, it was not to be sought there.

Then as to the consensual jurisdiction.

The parties to the contract were the Crown, the Bishop of Cape Town, and the Bishop of Natal. The dates were important—

Dr. Colenso's Patent was dated . . . Nov. 8, 1853.

„ Oath of Submission Dec. 8, 1853.

Dr. Gray's Patent. Dec. 8, 1853.

Now it was true that Dr. Colenso's patent was dated a little earlier than that of his metropolitan, but they contended that it was clear that this formed part of one complete arrangement. The various letters patent, the resignation, re-appointment, the oath, &c., formed but one transaction in which the relative positions of the sees of Natal and Cape Town were defined.

In his own letters patent, Dr. Colenso had been referred to others which were about to be granted to the Bishop of Cape Town, and he must be taken as abiding by the arrangement which both were intended to carry into effect. That view put an end to the argument that at the time of his oath the Bishop of Natal did not know the form of the letters patent constituting the see of Cape Town. It was not a question of dates. The whole transaction was based on one common understanding, and if Dr. Gray was Bishop of Cape Town at all, if Dr. Colenso was

Bishop of Natal at all, they must be held both of them to have fully consented to, and recognised, all parts of the understanding, and of the forms in which their appointment as bishops was carried out. To say that the Bishop of Cape Town had himself consented to an appeal to the Crown, was utterly inconsistent with the argument that the Bishop of Natal did not consent to the jurisdiction pointed out by the patent. There was not a word in the letters patent of any appeal to the Crown direct, and if the Crown had not consented to such an appeal, it could not be constituted by the private agreement of third parties.

3rd. Had the Crown original jurisdiction in the matter, visitatorial or otherwise? Over whom could the Crown exercise the visitatorial jurisdiction which it was suggested that it possessed? Was it over the Bishop of Natal? Clearly not, for over him the Crown had appointed the Bishop of Cape Town visitor. Was it over the Bishop of Cape Town? No, for the letters patent no less expressly declared that he should be subject to the jurisdiction of the Archbishop of Canterbury.

Any original jurisdiction which the Crown might have possessed under 26 Hen. 8, no longer existed, for that statute had been repealed, while 1 Eliz. c. 1, s. 17, did nothing more than affirm that all jurisdiction must emanate from the Crown, and not from any foreign power, not by way of original jurisdiction,—but flowing from the Crown through the regular Courts of the realm. To support any such original jurisdiction, the extravagant proposition must be maintained, that the Crown had *proprio vigore* authority to try the Bishop of Natal or the Bishop of Cape Town for heresy.

W. M. James contended, in reply, that the letters patent created no consensual jurisdiction, the contract entered into was nothing more than that the persons to whom the letters were addressed engaged thereby to obey the laws of the Anglican Church. With reference to the statement that the Queen was not visitor of the Bishops of Cape Town and Natal, because in their cases visitors had been specially appointed, he argued that the authority of statutes and textbooks, indeed the whole language of the law, proved that the Sovereign was "The supreme visitor, visitor ordinary, and governor of the Church, to redress and repress all abuses, anomalies and wrongs."

The government of Natal was established under 6 & 7 Vict. c. 13. By 42 Parliamentary Papers, 1847-8, it appeared that Natal was not a conquered, but a settled, colony.

Letters patent were issued in 1844, providing for the annexation of the district of Natal, with a proviso that no Court or magistrate within the Cape of Good Hope should acquire, hold, or exercise any jurisdiction within the colony of Natal, which was thus made independent of Cape Town, with a view of giving it a separate government. How could the

Bishop of Cape Town hold a Court in Cape Town for the trial of an offence committed in the independent settlement of Natal? The words which conferred metropolitane jurisdiction upon the Bishop of Cape Town were, "We will and ordain that the said Right Rev. Father in God, Robert Gray, Bishop of the said see of Cape Town, and his successors the bishops thereof for the time being, shall be, and be deemed and taken to be, the metropolitan bishop in the colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena." The letters patent went on to say: "And we will and ordain that the bishops of Graham's Town and Natal respectively, shall be suffragan bishops to the said Bishop of Cape Town, and his successors; and we will and grant to the said Bishop of Cape Town, as metropolitan of the Cape of Good Hope, and the Island of St. Helena, to perform all functions peculiar and appropriate to the office of metropolitan, within the limits of the said see of Graham's Town and Natal." Now Natal was not one of the dependencies of the Cape of Good Hope, and the metropolitane jurisdiction given over Natal was expressly given only to be exercised within the limits of Natal. This, therefore, was strictly a visitatorial jurisdiction. It was one of the first principles of ecclesiastical law, that where any power of visitation of an ecclesiastic was given to an ecclesiastic as ordinary, his authority was subject to appeal through the recognised courts of ecclesiastical jurisdiction. He contended, therefore, that by the letters patent visitatorial power was given to the Bishop of Cape Town over Dr. Colenso, in accordance with the English law as to ecclesiastical corporations, which visitatorial power he could exercise only within the limits of Natal, and subject to appeal to the Sovereign. Under the authority of the letters patent, a general superintendence was granted to the Archbishop of Canterbury; but he was not constituted a general appellant Judge. If he were, how could he exercise his jurisdiction? How had he ever accepted the burden of such a jurisdiction? How if he were to pass sentence on the Bishop of Natal, could that sentence be enforced? Next as to the argument that the appellant ought to have sought redress in the local Courts. He might, indeed, have applied, not appealed, to those Courts for a prohibition; but the propriety of the decision could in no way be tried there: and was he to go to the Courts of Natal, or of Cape Town? What jurisdiction could the Courts of Natal exercise over proceedings in Cape Town, or the Courts of Cape Town over proceedings in Natal? There had been, he believed, no single instance in the Roman Catholic Church, before *Lucy v. Watson* (*loc. cit.*), of the deprivation of a bishop by an archbishop? It was, indeed, the clear doctrine of the Church, that no bishop could be deprived, *sine auctoritate sanctæ sedis*. The cases of *Bonner* and *Gardiner* were thoroughly and completely legal. The real effect of the statutes of Henry the Eighth and Elizabeth, was to put the

Sovereign into the Pope's place as Head of the Church. He contended that the decision in *Lucy v. Watson*, was in favour of the Royal prerogative.

The contention on the other side was, that the Bishop of Natal held precisely the same relative position to the Bishop of Cape Town, as the Bishop of London to the Archbishop of Canterbury. But how would the Bishop of London be deprived by the Archbishop of Canterbury? Why, by a complete Court, exercising justice on the Queen's behalf, and therefore the Queen's Court, and from which there was a direct appeal. How then could the Bishop of Natal be subject and subordinate to the Bishop of Cape Town, in the same way as a suffragan of the diocese of Canterbury to his metropolitan, when the Bishop of Cape Town could hold no complete Court? In the Roman Catholic Church, heresy required a solemn form of trial by Council to be ratified by the Pope, and in our Church, it must be tried by the Queen in her visitatorial capacity, issuing a commission. The statute abolishing the High Commission Court had really no bearing, for that Court was only abolished, so far as it was a Court which had the power of inflicting corporal and temporal punishments, fines, imprisonments, &c., and it was only so far a Statutory Court. This, therefore, in no way interfered with ecclesiastical commissions proper; and as a matter of fact, various commissions had since the days of Charles the First been issued by the Crown. Therefore the appellant had a right to appeal to the Queen in Council.

(a.) As a matter of legal jurisdiction.

(b.) As a matter of jurisdiction according to the discipline of the Church of England, settled in the colonies.

(c.) As this was a dispute between two officers of the Crown.

(d.) As a matter affecting the Queen herself, and her relation with the Bishop of Natal, not perhaps a strict legal right, but they had claimed both on public and private grounds to have that relation determined in the most effectual manner.

They, therefore, prayed their Lordships to advise her Majesty to declare that the proceedings at Cape Town were null and void, and that the letters patent were in full vigour, if not to advise her Majesty to hear the matter on its merits. He cited further,

Rerum Britannicarum Medii Ævi Scriptores;

Dr. Pecock's Case. Intn. p. 36 (Babington's ed. 1860.)

20 MARCH, 1865.

THE LORD CHANCELLOR delivered the opinion of the Committee: The Bishop of Natal and the Bishop of Cape Town (who are the parties to this proceeding) are ecclesiastical persons who have been created bishops by the Queen, in the exercise of her authority as Sovereign of this realm and head of the Established Church. These bishops were

consecrated under mandate from the Queen by the Archbishop of Canterbury, in the manner prescribed by the law of England. They receive and hold their dioceses under grants made by the Crown. Their status, therefore, both ecclesiastical and temporal, must be ascertained and defined by the law of England; and it is plain that their legal existence depends on acts which have no validity or effect, except on the basis of the supremacy of the Crown.

Further, their respective and relative rights and liabilities must be determined by the principles of English law applied to the construction of the grants to them contained in the letters patent; for they are the creatures of English law, and dependent on that law for their existence, rights, and attributes. We must treat the parties before us as standing on this foundation and on no other.

Three principal questions arise, and have been argued before us. First. Were the letters patent of the 8th December, 1853, by which Dr. Gray was appointed metropolitan, and a metropolitan see or province was expressed to be created, valid and good in law? Secondly. Supposing the ecclesiastical relation of metropolitan and suffragan to have been created, was the grant of coercive authority and jurisdiction, expressed by the letters patent to be thereby made to the metropolitan, valid and good in law? Thirdly. Can the oath of canonical obedience taken by the appellant to the Bishop of Cape Town, and his consent to accept his see as part of the metropolitan province of Cape Town, confer any jurisdiction or authority on the Bishop of Cape Town by which this sentence of deprivation of the bishopric of Natal can be supported?

With respect to the first question, we apprehend it to be clear, upon principle, that after the establishment of an independent Legislature in the settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its prerogative (for these letters patent were not granted under the provisions of any statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status, rights, and authority the colony could be required to recognise.

After a colony or settlement has received legislative institutions the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom.

It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a bishop, but it has no power to assign him any diocese, or give him any sphere of action within the United Kingdom. The United Church of England and Ireland is not a part of the constitution in any colonial settlement, nor can its authorities, or those who bear office in it, claim to be recognised by the law of the colony, otherwise than as the members of a voluntary association.

The course which legislation has taken on this subject is a strong proof of the correctness of these conclusions. In the year 1813 it was deemed expedient to establish a bishopric in the East Indies (then under the government of the East India Company), and although the bishop was appointed and consecrated under the authority of the Crown, yet it was thought necessary to obtain the sanction of the Legislature, and that an Act of Parliament should be passed to give the bishop legal status and authority. Accordingly by statute 53 Geo. 3., c. 155, s. 49, it was enacted that in case it should please his Majesty by his royal letters patent to erect, found, and constitute one bishopric for the whole of the British territories in the East Indies and parts therein mentioned, a certain salary should be paid to the bishop by the East India Company, and by the 51st and 52nd sections it was enacted that such bishop should not have or use any jurisdiction, or exercise any episcopal functions whatsoever, but such as should be limited to him by letters patent, and that it should be lawful for his Majesty by letters patent to grant to such bishop such ecclesiastical jurisdiction and the exercise of such episcopal functions within the East Indies and parts aforesaid as his Majesty should think necessary for administering holy ceremonies, and for the superintendence and good government of the ministers of the Church establishment within the East Indies and parts aforesaid. Subsequently, in the year 1833, it was deemed right to found two additional bishoprics, one at Madras and the other at Bombay, and again an Act of Parliament (3 & 4 Will. 4, c. 86) was passed, by the 93rd section of which it was enacted in like manner that the Crown should have power to grant to such bishops within their dioceses ecclesiastical jurisdiction; and it was also enacted and declared that the Bishop of Calcutta should be metropolitan in India, and should have, as such, all such jurisdiction as the Crown should by letters patent direct, subject, nevertheless, to the general superintendence and revision of the Archbishop of Canterbury; and it was provided that the Bishops of Madras and Bombay should be subject to the Bishop of Calcutta as metropolitan, and should take an oath of canonical obedience to him.*

So again when in 1824 a bishop was appointed in Jamaica by letters patent containing clauses similar to those which are found in the letters patent to the present appellant, it was thought necessary that the legal status and authority of the bishop should be confirmed and established by an Act of the Colonial Legislature. The consent of the Crown was given to this Colonial Act, which would have been an improper thing, as an injury to the Crown's prerogative, unless the law advisers of the Government had been satisfied that the colonial statute was necessary to give full effect to the establishment of the bishopric.

The conclusion is further confirmed by observing the course of Imperial legislation on the same subject, namely, the creation of new bishoprics in England.

When four new bishoprics were constituted by Henry the Eighth, it appears to have been thought necessary, even by that absolute monarch, to have recourse to the authority of Parliament, and the Act that was passed (viz., the 31 Hen. 8, c. 9, which is not found in the ordinary edition) is of a singular character. After referring to the slothful and ungodly life which had been used among all those which bore the name of religious folk, and reciting that it was thought, therefore, unto the King's Highness most expedient and necessary that more bishoprics, collegiate, and cathedral churches should be established, it was enacted that his Highness should have full power and authority from time to time to declare and nominate by his letters patent or other writing to be made under his Great Seal, such number of bishops, such number of cities, sees for bishops, cathedral churches, and dioceses by metes and bounds, for the exercise and ministration of their episcopal offices and administration as shall appertain, and to endow them with such possessions after such manner, form, and condition as to his most excellent wisdom shall be thought necessary and convenient.

This statute, which was repealed by 1 & 2 Philip & Mary, c. 8, s. 18, does not appear to have been revived. It is remarkable as granting power to nominate and appoint new bishops, as well as to create new sees and dioceses.

So also in recent times the two new bishoprics of Manchester and Ripon were constituted, and the new bishops received ecclesiastical jurisdiction, under the authority of an Act of Parliament. It is true that it has been the practice, for many years, to insert in letters patent creating colonial bishoprics, clauses which purport to confer ecclesiastical jurisdiction; but the forms of such letters patent were probably taken by the official persons who prepared them from the original forms used in the letters patent appointing the East Indian bishops, without advertent to the fact that such last-mentioned letters patent were granted under the provisions of an Act of Parliament.

We therefore arrive at the conclusion that although in a Crown colony, properly so called, or in cases where the letters patent are made in pursuance of the authority of an Act of Parliament (such, for example, as the Act of 6 & 7 Vict. c. 13), a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the letters patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent Legislature.

The subject was considered by the Judicial Committee in the case of *Long v. The Bishop of Cape Town* (*loc. cit.*), and we adhere to the principles which are there laid down.

The same reasoning is of course decisive of the second question, whether any jurisdiction was conferred by the letters patent. Let it be granted or assumed that the letters patent are sufficient in law

to confer on Dr. Gray the ecclesiastical status of metropolitan, and to create between him and the Bishops of Natal and Graham's Town the personal relation of metropolitan and suffragan as ecclesiastics, yet it is quite clear that the Crown had no power to confer any jurisdiction or coercive legal authority upon the metropolitan over the suffragan bishops, or over any other person.

It is a settled constitutional principle or rule of law, that although the Crown may, by its prerogative, establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord Coke, in the Fourth Institute, that the erection of a new Court, with a new jurisdiction, cannot be without an Act of Parliament.

It cannot be said that any ecclesiastical tribunal or jurisdiction is required in any colony or settlement where there is no established Church, and in the case of a settled colony the ecclesiastical law of England cannot, for the same reason, be treated as part of the law which the settlers carried with them from the mother country.

So much of the letters patent now in question as attempts to confer any coercive legal jurisdiction is also in violation of the law as declared and established by that part of the Act of the 16 Car. 1, c. 11, which remains unrepealed by the 13 Car. 2, c. 12. It may be useful to state this in detail. By the 16th and 17th sections of the 1 Eliz. c. 1, intituled "An Act for Restoring to the Crown the Ancient Jurisdiction over the State, Ecclesiastical and Spiritual, and Abolishing all Foreign Power Repugnant to the Same," it was enacted, that all usurped and foreign power and authority, spiritual and temporal, should for ever be extinguished within the realm, and that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been, or might lawfully be, exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same; and of all manner of heresies, schisms, abuses, offences, contempts, and enormities, should for ever be united and annexed to the Imperial Crown of this realm. And by the 18th section the Queen was empowered by letters patent to appoint persons to exercise, occupy, use, and execute all manner of spiritual or ecclesiastical jurisdiction within the realms of England and Ireland, or any other the dominions and countries of the Crown.

Under this statute the High Commission Court was erected, which was abolished by the 16 Car. 1, c. 10.

By the Act of the 16 Car. 1, c. 11, the 18th section of the 1 Eliz. c. 1, was wholly repealed; and by the 4th section of the same statute, all spiritual and ecclesiastical persons or Judges were forbidden, under severe penalties, to exercise any jurisdiction or co-

ercise legal authority, an enactment which closed all the regular established ecclesiastical tribunals; but, by the 13 Car. 2, c. 12, the ordinary ecclesiastical jurisdiction and authority, as it existed before the year 1639, was, with certain savings, restored to the archbishops and bishops. And the Act of the 16 Car. 1, excepting what concerned the High Commission Court, or the erection of any such like Court by commission, was repealed; but with a proviso, that nothing should extend, or be construed to revive or give force, to the enactments contained in the 18th section of the 1 Eliz. c. 1, which should remain and stand repealed.

There is, therefore, no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction: and the clauses which purport to do so, contained in the letters patent to the appellant and respondent, are simply void in law. No metropolitan or bishop in any colony having legislative institutions can, by virtue of the Crown's letters patent alone (unless granted under an Act of Parliament, or confirmed by a colonial statute), exercise any coercive jurisdiction, or hold any Court or tribunal for that purpose.

Pastoral or spiritual authority may be incidental to the office of bishop; but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs, and suspension or privation of office is matter of coercive legal jurisdiction, and not of mere spiritual authority.

Third. If, then, the Bishop of Cape Town had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of Natal?

There is nothing on which such an argument can be attempted to be put, unless it be the oath of canonical obedience, taken by the Bishop of Natal to Dr. Gray as metropolitan.

The argument must be, that, both parties being aware that the Bishop of Cape Town had no jurisdiction or legal authority as metropolitan, the appellant agreed to give it to him by voluntary submission.

But even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction.

There remains one point to be considered. It was contended before us, that if the Bishop of Cape Town had no jurisdiction, his judgment was a nullity, and that no appeal could lie from a nullity to Her Majesty in Council.

But that is by no means the consequence of holding that the respondent had no jurisdiction. The Bishop of Cape Town, acting under the authority which the Queen's letters patent purported to give, asserts that he has held a court of justice; and that with certain legal forms he has pronounced a judicial sentence, and that by such sentence he has deposed the Bishop of

Natal from his office of Bishop, and deprived him of his see. He also asserts that, the sentence having been published in the diocese of Natal, the clergy and inhabitants of the diocese are thereby deprived of all episcopal superintendence. Whether these proceedings have the effect which is attributed to them by the Bishop of Cape Town, is a question of the greatest importance, and one which we feel bound to decide. We have already shown that there was no power to confer any jurisdiction on the respondent as metropolitan. The attempt to give appellate jurisdiction to the Archbishop of Canterbury is equally invalid.

This important question can be decided only by the Sovereign, as head of the Established Church and depository of the ultimate appellate jurisdiction.

Before the Reformation, in a dispute of this nature between two independent prelates, an appeal would have lain to the Pope; but all appellate authority of the Pope over members of the Established Church is by statute vested in the Crown.

It is the settled prerogative of the Crown to receive appeals in all colonial causes, and by the 25 Hen. 3, c. 19 (by which the mode of the appeal to the Crown in ecclesiastical causes is directed), it is, by the 4th section, enacted that, "for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the Court of Chancery," an enactment which gave rise to the Commission of Delegates, for which this tribunal is now substituted.

Unless a controversy, such as that which is presented by this appeal and petition, falls to be determined by the ultimate jurisdiction of the Crown, it is plain that there would be a denial of justice, and no remedy for great public inconvenience and mischief. It is right to add, although unnecessary, that, by the Act 3 & 4 Will. 4, c. 41, which constituted this tribunal, Her Majesty has power to refer to the Judicial Committee for hearing or consideration any such other matters whatsoever as Her Majesty shall think fit, and this Committee is thereupon to hear or consider the same, and to advise Her Majesty thereon: and that on the 10th June, 1864, it was ordered by Her Majesty in Council that the petition and supplemental petition of the appellant should be, and the same were, thereby referred to this Committee, to hear the same and report their opinion to Her Majesty.

Their Lordships, therefore, will humbly report to Her Majesty their opinion that the proceedings taken by the Bishop of Cape Town, and the judgment or sentence pronounced by him against the Bishop of Natal, are null and void in law.

Note.—See*

Advocate-General of Bengal v. Rames Surnomoy,
2 N. R. 530.

Lords Justices. { *Re THE SCOTTISH UNIVERSAL
FINANCE BANK (Limited).
17 MARCH, 1865.* } *Ex parte SHIP.*

*Practice—Winding-up—25 & 26 Vict. c. 89, s.
35—Application for Leave to Intervene.*

On an appeal motion by the official liquidator of a limited company from an order under the 35th section of the Companies Act, 1862, removing a name from the register of members, the Court will give leave to a contributory, who has an interest in the result of the appeal, to give notice of motion to intervene, and to file affidavits bringing forward fresh evidence.

This was an appeal from an order of Wood, V.-C., made on the motion of Mr. Ship, under the 35th section of the Companies Act, 1862, that the register of members of the company might be rectified by striking out his name.

The Vice-Chancellor made the order on the ground that the objects of the company, as defined in the articles of association, were different from, and more extensive than, the objects of the company mentioned in the prospectus.

The prospectus referred to the success attained by the Crédit Mobilier of Paris, and stated that the projectors of the company proposed to form an institution in Scotland founded on similar principles, but embracing a larger field for its operations.

Giffard, Q.C., and *W. Morris*, for the official liquidator, in support of the appeal.

On the case being opened,

W. W. Mackeson, on behalf of Mr. Downes, one of the original directors of the company, who had retired from the direction before the company was in serious difficulties, and was a holder of forty shares, asked that the appeal motion might stand over, with liberty to Mr. Downes to give notice of motion to intervene, and to file affidavits. He submitted, in order to obtain a *locus standi*, to be fixed as a contributory in respect of one share, and contended that, as it was competent to him under the Act to move to discharge the order as soon as the list of contributories was settled, so he ought, in order to save expense, to be allowed to intervene at once. He proposed to file further affidavits to explain the import of the term "universal" in the title of the company, and the nature of the Crédit Mobilier of Paris mentioned in the prospectus.

Locock Webb (Roll, Q.C., with him), for Mr. Ship, opposed the application.

THE LORDS JUSTICES said, that if the motion were heard before them as it had been heard before the Vice-Chancellor, the whole question might be afterwards reopened; for when Mr. Downes was afterwards put upon the list of contributories, he might move on fresh evidence to discharge the order. They directed that, on

Mr. Downes' consent to be fixed as a contributory in respect of some share or shares in the company, the motion should stand over, with liberty to him to give notice of motion to intervene and file affidavits.

Note.—A notice of motion to discharge the Vice-Chancellor's order was subsequently given "on behalf" of Mr. Downes, a contributory of the company, by "special leave given to him upon his admission that" he is a contributory of the company, but reserving the extent of his liability as such."

Lords Justices. } *Re T—.*
17 MARCH, 1865.

*Practice—Lunacy—Claim against a former
Committee for Maintenance of the Lunatic—
Settled Accounts.*

Where the committee of a lunatic's estate had passed his accounts and resigned his office, leaving a debt for maintenance of the lunatic still due to a third person, and the new committee repudiated the debt, the Court, on the petition of the creditor served on the new committee, directed a reference to the Master to ascertain the amount of the debt.

This was a petition in lunacy, presented by a medical gentleman under the following circumstances.

The lunatic was an illegitimate child who had been placed by her mother under the care of the petitioner with an allowance of 300*l.* per annum for maintenance, &c. This allowance was paid up to October, 1857, and in the following September the mother of the lunatic died.

In the beginning of the year 1860, the petitioner gave up the custody of the lunatic on the appointment of a new committee of her person and estate. There was then due to him a sum of above 300*l.* The accounts between the former and the new committee were settled without any notice to the petitioner: the new committee repudiated the petitioner's claim, and the Master in Lunacy, who had charge of the matter, declined to interfere, on the ground that the accounts of the former committee had been passed.

The lunatic was entitled to property producing nearly 300*l.* per annum.

The petitioner prayed that he might be declared to be a creditor on the lunatic's estate for the amount of his debt, and that the amount of the debt might be raised by a sale of a sufficient portion of the lunatic's property.

The petition was served on the committee and the Attorney-General.

J. T. Crossley, in support of the petition, said that the petitioner had no means of obtaining payment of the sum due to him except by the present application.

Bagshawe, for the committee, opposed the petition as irregular.

Wickens, for the Crown, raised no objection to it.

THE LORDS JUSTICES said, that there was no precedent for such a petition, and that they were unwilling either to make the order on the application of the petitioner, or to let the petitioner proceed at law. They ultimately made the following order—

Minute.—The committee appearing and making the application, order that it be referred to the Master to take an account of what sum, if any, is justly due to the petitioner from the estate of the lunatic. The petition to stand over for the Master's certificate.

Master of the Rolls. { *Re THE LANCASHIRE*
18, 20 MARCH, 1865. { *BRICK AND TILE COM-*
 PANY (Limited).

*Winding up—Limited Company—Paid-up
Share—Pleading.*

A holder of paid-up shares in a limited company cannot maintain a petition to have the company wound up, if the company is insolvent.

But he can maintain such a petition, if he proves that the company has ceased to carry on business, and that, on all the shareholders contributing equally to pay the debts of the company, he would receive back part of what he had paid on his shares.

Semble, General allegations in a winding-up petition, unsupported by specific facts, are not sufficient to maintain the petition.

This was a petition to wind up the above-mentioned company, presented by the holder of thirty paid-up shares in it.

The petition alleged that the business of the company had stopped, and that all the plant, machinery, fixtures, and stock were included in bills of sale, improperly given to two of the directors. When the petition was served there was no officer or servant of the company at the registered office. The debts were alleged to be considerable, but the actual amount was not stated. The only assets of the company, since the sales, were sums due for unpaid calls, which, though the exact amount was not stated, were alleged to be sufficient, after payment of the debts, to leave a surplus for division among the shareholders. There was an affidavit verifying the general allegations in the petition, but not stating any particulars in support of them. It appeared that, since the filing of the petition, a sale had been effected under the bills of sale. No evidence was filed in opposition.

Baggallay, Q.C., for the company, took the preliminary objection that the petitioner, being the holder of paid-up shares in a limited company, could not maintain the petition,

Re the Patent Artificial Stone Company, Limited,
5 N. R. 212.

THE MASTER OF THE ROLLS said that he did not think that the petitioner's shares being fully paid up, *ipso facto*, prevented this application. In all such cases he must hear the facts of the case.

E. K. Karlake, for the petitioner, admitted, that if the company was insolvent, the petitioner would have no right to present the petition; but contended that it was otherwise, where there would be ultimately a surplus divisible among the shareholders. That would be the case here, if the unpaid calls were all collected. The company was solvent, but, since the sales, could not possibly continue its business. The circumstances relating to the bills of sale required investigation. Without a winding up the calls would not be enforced, and the assets would thus be lost. The petitioner, by having paid up his shares, bore a larger portion of the debts of the company than those shareholders who had not paid their calls; and it would be unjust, if the latter should not contribute, and the petitioner should not recover anything. If the petitioner could not maintain this petition, he was without a remedy. The other shareholders should be made to contribute the same amount as the petitioner, and the surplus should be divided *pro rata*.

The petitioner, being a member of the company, was clearly a contributory under the 11 & 12 Vict. c. 45, s. 3; and the definition of a contributory in 25 & 26 Vict. c. 89, s. 74, was merely a short mode of defining the same persons.

As the petitioner was entitled to a *pro rata* portion of the surplus assets, he was liable to contribute out of that surplus.

The statements in the petition were sworn to and uncontradicted; and it would be useless expense to set out the details at length, before it was known whether the petition would be opposed. If it stood over, the detailed facts might be supplied.

Baggallay, Q.C., for the company, argued that the petitioner was not a contributory within the meaning of the 74th section of 25 & 26 Vict. c. 89, and that the case was not brought within the 79th section, the 5th clause of which must be a case *ejusdem generis*, as the four previous clauses. If the bills of sale were improper, the petitioner had other means of obtaining a remedy. As for the allegations, that the assets would be lost, if there was no winding up, and that there would be a divisible surplus, if there was a winding up, the Legislature had not made those matters causes for winding up.

E. K. Karlake, in reply.

20 MARCH, 1865.

THE MASTER OF THE ROLLS said: The principle in the case of limited companies was this: a shareholder, who had paid up the whole amount of his shares, had no interest in the company, if it was wholly insolvent. Such a shareholder had, however,

an interest to this extent : that if the business of the company had stopped, and it was not intended to carry on the business any longer, and the debts were inconsiderable, and were going to be thrown entirely on him and the other shareholders who had paid up, then, in accordance with the maxim that equality is equity, he was entitled to come to the Court, and make the other shareholders, who had not paid up their calls, contribute equally with him for the payment of the debts of the company, and, in fact, repay him part of what he had paid on his shares. He was entitled to say that the debts should not be thrown exclusively on him, and that, if they had been, he should be repaid by the other shareholders. It was the same as in the case of unlimited companies, where one shareholder, having paid all the debts, was entitled to come to the Court to enforce a contribution from all the other shareholders. His Honour would not, therefore, say that in no case could a person, who held fully paid-up shares, come to the Court for a winding-up order ; but, if he did come, the onus lay on him of proving a reasonable case. What amount of weight such a case must have, depended on the particular facts in each instance. In this instance, it was impossible to tell what was the amount of debts, or whether the shares were really all paid up or not, or whether there would or not be an actual surplus. It would be idle to make an order if there were no assets.

If the facts were to the effect stated in the petition, the petitioner might present another petition and prove them ; but as the present petition was not asked to stand over until after His Honour, in the course of the argument, had expressed an opinion that the petition was insufficient, he could not allow it to be amended ; and it must be dismissed with costs.

Stuart, V.-C. } *Ex parte* THE ECCLESIASTICAL
17 MARCH, 1865. } COMMISSIONERS FOR ENGLAND.

*Company—Lands Clauses Consolidation Act—
Payment out of Court—Costs.*

The Court has no jurisdiction, except by express enactment, to make a company pay the costs of a petition for payment out to persons becoming absolutely entitled of moneys paid into the Court of Chancery or the Court of Exchequer, in respect of lands taken by the company from owners under disability.

This was a petition by the Ecclesiastical Commissioners for the payment out of court to them of several sums of stock which had been paid in in respect of lands belonging to the see of Canterbury and enfranchised or taken, from time to time, by the Copyhold Commissioners, the Secretary at War, and fifteen public companies. The petitioners became entitled to the emoluments of the see of Canterbury, by virtue of

the 23 & 24 Vict. c. 124, s. 2, on the death of the late archbishop in 1862.

G. O. Morgan, for the petitioners, asked that the costs of the petition might be borne equally by the fifteen companies, the Copyhold Commissioners and the Secretary at War not being liable to pay them,

Ex parte Bishop of London, 2 De G. F. & J. 14.

Briggs, Elphinstone, and Bardswell, for three of the companies whose Acts directed payment into Chancery, but only contained provisions for the costs of re-investment, and not for the costs of payment out of Court to persons absolutely entitled, contended that the Court had no jurisdiction to burden them with costs,

Re Ellison, 8 De G. M. & G. 62 ;

Re Gould, 24 Beav. 442 ;

Ex parte Molyneux, 2 Coll. 273.

E. K. Karlake, for a company governed by similar provisions as to costs, but whose purchase-moneys were payable, and had been paid, into the Exchequer before the 5 Vict. c. 5, also objected to bear any part of the petitioners' costs.

The other companies were bound, as to costs, either by the 80th section of the Lands Clauses Consolidation Act, or by similar sections of their special Acts.

W. W. Cooper, A. G. White, Marten, Roupell, Bird and Freeland, appeared for various defendants.

G. O. Morgan in reply.

This may be considered as a re-investment, for the money is liable, in our hands, to be laid out in land. As to payments into the Exchequer, this Court follows the old practice of the Court of Exchequer, which was to make the company pay the costs of payment out of Court,

In re Robertson, 24 Beav. 433 ;

In re The Tiverton Market Act, 26 Beav. 239.

At all events, the whole of our costs must be paid equally by those companies which are liable.

STUART, V.-C., said : This could not be treated as a re-investment in land, because no specific purchase was proposed. He should only charge those companies with the petitioners' costs whose Acts expressly authorised the Court to charge them with the costs of paying out the principal money, and should not follow the practice of the Court of Exchequer as to money paid into that Court. The companies charged would pay each one-seventeenth part of the petitioners' costs.

Note.—See

Re Moulsey, 4 K. & J. 86 n. ;

Re Metford, 8 W. R. 634 ; 6 Jur. (N. S.) 796.

Wood, V.-C. } DAVENPORT v. GOLDBERG,
8 FEB., 25 MARCH, } and
1865. } DAVENPORT v. PHILLIPS.

Practice—Patent—Granting Issues.

Where a patentee has once successfully maintained the validity of his patent in a trial before a jury, this Court will not, on the application of the defendants, direct the usual issues as to the novelty of the invention or the sufficiency of the specification to be tried before a jury, unless the defendants have distinctly raised such questions by their answer, or unless it shall appear to the Court, at the hearing of the cause, that such issues ought to be granted.

Where a patentee had obtained a verdict at Law upon an action brought by him against a person who had infringed his patent, and where the same patentee had obtained a verdict on the usual issues directed by this Court in a suit brought by him against another person for infringement, and where, in a suit brought by the same patentee against a third party for infringement, the defendant had denied the infringement by his affidavits in such a manner that the plaintiff had not ventured to move for an interlocutory injunction, but the defendant had not distinctly denied the want of novelty of the invention, or the sufficiency of the specification, by his answer, and the plaintiff had given notice of motion for a decree, the Court, on the application of the defendant, directed an issue as to the infringement to be tried before a jury at the same time as the motion for decree came on, but refused to direct any other issues to be tried; and where the defendant had not denied infringement by affidavit the Court refused to direct an issue as to it.

DAVENPORT v. GOLDBERG.

The plaintiff in this suit was the owner of a patent dated the 13th of November, 1851, for improvements in the manufacture of chenille and other piled fabrics. After several years' enjoyment of his patent, he suspected that several persons were infringing his patent, and in November, 1860, he caused notices to be served upon them, warning them from doing so. He then took proceedings at Law against Messrs. Richards, two of the infringers, and the action was actively prosecuted and actively defended. The action was, after a lengthened litigation, brought to a termination, and the plaintiff obtained judgment, establishing, as between himself and the other parties to the record, the validity of the patent, and the fact of the infringement by Messrs. Richards. Subsequently, in the latter part of 1862, the present plaintiff filed his bill against Jepson, another person who, as he alleged, had infringed his patent. In the suit of *Davenport v. Jepson* (1 N. R. 173, 307, 471), the usual issues raising the questions as to prior user, sufficiency of the specification, infringement, and whether the grantees of the letters patent were the inventors of the new manufacture, were tried before Wood, V.-C., with the assistance of a jury. The jury could not agree, and

were discharged without giving a verdict, so that it became necessary to try the same issues before another jury. The defendant Jepson did not appear on the second trial, and the jury, after hearing the plaintiff's evidence, found a verdict for him on all the issues.

The present suit of *Davenport v. Goldberg* was instituted by Davenport against Goldberg and others, in respect of an alleged infringement of the plaintiff's letters patent.

The plaintiff gave notice of an interlocutory application (which he afterwards abandoned) for an injunction. He then gave notice of motion for a decree.

The defendant, pending the notice of motion for decree, gave notice of motion for the trial of issues before the Court and a special jury, and for inspection of the plaintiff's machines; the form of the issues being the same, *mutatis mutandis*, as that of the issues in *Davenport v. Jepson*, 1 N. R. 308.

Roll, Q.C., Karlake, and T. Aston, for the defendants.

So far as the question of infringement is concerned, this is quite a different case from anything which has gone before, and we are entitled to have it tried before a jury.

The novelty of the invention has not been finally established against the world at large, although the Court might, after the long user that the plaintiff has enjoyed, and the verdict which he has obtained at Law, have assumed it to have been established for the purposes of a mere interlocutory application. Even after a full trial, a new defendant is not precluded from raising the same defence of want of novelty, and from having it tried again before a jury. It may be the case, that some prior user, unknown to a defendant in the former trial, may since have been discovered. A trial only concludes the case as between the parties on the record.

Having these issues tried before a jury, will not necessarily cause any delay.

[Here WOOD, V.-C., intimated that he was not inclined at present to direct any issue to be tried before a jury as to the question of novelty, leaving the propriety of his directing such an issue to be argued on the motion for decree.]

Willcock, Q.C., Hardy, and Webster, for the plaintiff, did not make any objection to the course proposed to be taken on the question of infringement; but objected to the other proposed issues being sent to a jury.

Roll, Q.C., in reply, contended that, unless all the issues were on the record, the defendants would be placed in difficulty in the event of an appeal to the House of Lords. The issues as to the novelty and as to the specification, ought to be placed on the record, even if they were to be tried by the Court itself, without the aid of a jury.

WOOD, V.-C., said: The course taken by the plaintiff was such as to satisfy him that there was a real question to try as to the infringement. He was

of opinion that where the rights of patentees on the one hand, and of the public on the other hand, were concerned, and where the defendant had raised such a case by his affidavits that the plaintiff did not venture to move for an interlocutory injunction, the question ought to be tried by a jury. For a similar reason he should not, in the present state of the cause, direct any issues as to the question of novelty, or as to the specification, as the defendants had not raised these questions by their answer. Suppose, for the sake of argument, that the plaintiff should succeed on the question of infringement, in what a condition would he be placed if he were forced to go on trying these issues over and over again against every person who infringes his patent? It was open to any person who wished to dispute the novelty of the patent to bring a *scire facias*. The cause would be heard on motion for decree, on all the questions, except that of infringement,—as to which he should direct an issue to be tried before a jury at the hearing of the motion for decree, when it would be competent for the defendants to satisfy him whether he ought to direct an issue on these other questions.

Minute.—The motion for decree to come on at the same time as the issue for infringement which is to be tried by a jury. The plaintiff to deliver particulars of breaches. The defendant, within fourteen days, to serve notice to the plaintiff where and in whose possession any machine relied upon by the defendant as being the machine by which chenille has been manufactured, can be inspected. The plaintiff, his scientific witnesses, &c., to be at liberty within fourteen days, to serve the defendants with notice of

their desire to inspect such machine, and within seven days after the notice, the plaintiff to be at liberty to inspect accordingly. And within fourteen days after the inspection by the plaintiff, or default by him, the defendants to be at liberty to inspect the plaintiff's machines on giving three days' notice—the machines, both of plaintiff's and defendants', to be put at work on such inspection. The plaintiff and defendants to be at liberty to take samples of the chenille made by such machines. The samples to be taken and affidavits to be filed within a fortnight. With liberty to apply to summon a jury, and to fix a day for hearing the motion for decree and the trial, the witnesses to be cross-examined in Court. The evidence of the defendant to be closed within a fortnight. The plaintiff to have a week to file answer in reply. A special examiner to be named at Chambers to go to Lyons to examine witnesses as to the matters to be tried before the jury.

DAVENPORT v. PHILLIPS.

This was a suit by the same plaintiff as in *Davenport v. Goldberg*, against another person who, as was alleged, had infringed the patent.

Willcock, Q. C., Hardy, and Webster, for the plaintiff.

Giffard, Q. C., and H. Humphreys, for the defendant.

WOOD, V.-C., refused to direct the usual issue, as to infringement, to be tried by a jury until such affidavits should be filed as would convince him that there was a real question to try.

COMMON LAW.

Q. B. } BIDDLE v. BOND.
23 JAN., 25 FEB. 1865.

Principal and Agent—Right of Bailee to set up jus tertii against Bailor.

Although the bailor of goods have come by the bailed goods tortiously only, and not by fraud, his bailee is not estopped from setting up, in answer to an action against him by the bailor, the title of the real owner, where the bailee defends upon the right and title and by authority of such real owner.

Plaintiff illegally distrained upon the goods of R, and delivered them to defendant, an auctioneer, to sell. Defendant received from R notice that the distress was void, and that he must not sell the goods, or, if he had sold them, that he must retain the proceeds for R. De-

fendant had sold the goods, but he withheld the proceeds from his principal, the plaintiff:—

Held, that to an action brought by the plaintiff for not accounting, and for money had and received, defendant could set up the title of R, if he defended upon the right and title and by the authority of R, though he had not paid over the proceeds to R, and although the distress whereby plaintiff obtained the goods was tortious only, and not fraudulent.

This was an action by principal against agent. The declaration contained two counts; the first in assumpsit for not accounting; second, for money had and received.

Pleas—to first count, non-assumpsit; to second count, never indebted.

The following were the facts:

The plaintiff, Biddle, levied a distress upon the

goods of one Robbins for alleged arrears of rent. In fact, no rent was due, nor ever had been due, from Robbins, between whom and the plaintiff there was no relation of landlord and tenant, but, on the contrary, an agreement for the purchase of the premises. Plaintiff having removed the distrained chattels, sent them to defendant, Bond, an auctioneer, with instructions to sell them by auction. A notice was sent by Robbins to defendant apprising him that the goods had been wrongfully taken, and requesting him not to sell, and, if he had already sold, not to pay over to plaintiff the proceeds of the sale. The goods were sold, but defendant refused to pay over to plaintiff the proceeds of the sale. Thereupon this action was brought, and was tried before Willes, J., at Guildford Summer Assizes, 1864, when the above facts were proved. The jury found that the distress was illegal. The verdict was entered for plaintiff, his Lordship reserving leave to defendant to move to enter the verdict for him, if the Court above should be of opinion that he was entitled to set up as against the plaintiff, his principal, the right of the real owner as a defence.

A rule was obtained accordingly, in Michaelmas Term, by *Parry, Serjt.* (with him *J. Morgan Howard*).

Thrupp, now showed cause.

The plaintiff is entitled to the proceeds of the goods, because the defendant is not at liberty to set up the *jus tertii*. The defendant was simply the plaintiff's agent.

[COCKBURN, C.J.—How can you claim money for goods to which you have no right? The defendant might have an action of trover brought against him by the true owner.]

The defendant ought then to have interpleaded. An agent can only set up the *jus tertii* against his principal in the case of fraud on the part of the principal,

Smith's Mercantile Law, 125 (5th ed.).

Hardman v. Wilcock, 9 Bing. 382 n.

The present case is an attempt to extend the doctrine in *Hardman v. Wilcock*, and to narrow the rule of estoppel between principal and agent.

The only exception to this rule is shown in

Sheridan v. The New Quay Company, 4 C. B. (N. S.) 650; 28 L. J. C. P. 58;

where Willes, J., said, that it was the obligation on the defendants as carriers, to receive and carry the goods, which gave them the right to set up the *jus tertii*. "The law ought equally to protect the defendants against the pseudo-owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him." In

Cheesman v. Exall, 6 Exch. 341,

it was laid down that a pledgee might set up the *jus tertii* against the pledgor, where pledgor fraudulently, and in order to avoid an execution, pledged the goods

which really belonged to third parties. Here there is no fraud. The rule is, that it is only where there is a purchase which is fraudulent on the part of the buyer, that no property passes.

[BLACKBURN, J.—There have been many decisions, especially recently in this Court, that where there is fraud the property passes, but the contract is voidable at the option of the defrauded party. And see

Load v. Green, 15 M. & W. 219, *per Parke, B.*;

and

White v. Garden, 10 C. B. 926; 20 L. J. C. P. 166.]

The estoppel which prevents an agent from disputing the title of his principal, and setting up a *jus tertii*, is founded on the analogy to the law of landlord and tenant. This is like the case of a tenant refusing to pay his rent to his landlord because it is demanded by a mortgagee, without showing that he has in fact paid it to the mortgagee. It is quite clear that he cannot plead a mere notice from a mortgagee to an action by the landlord,

Willon v. Dunn, 17 Q. B. 294; 21 L. J. Q. B. 60;

Hickman v. Machin, 4 H. & N. 716.

The defendant has not in fact set up the *jus tertii*. He has retained the proceeds of the goods, and, to an action by the true owner, may set up the plaintiff's right, so that he may set both parties at defiance, and keep the money.

There is no hardship on the defendant, for he ought to have interpleaded. There is no hardship on the true owner, for he might have replevied. His submitting to the distress almost amounts to an admission of his tenancy under the plaintiff.

Parry, Serjt., and *J. Morgan Howard*, argued in support. The distress was fraudulent on the part of the plaintiff, for he knew that so far from there being a tenancy, he had sold the house to the tenant.

[BLACKBURN, J.—The fraud does not appear from the reservation or the Judge's notes.]

At all events it was tortious, and Story on Agency, § 217 (4th ed.), citing, *Hardman v. Wilcock*, (*ubi supra*); *Taylor v. Plumer*, (3 M. & S. 562); *Wilson v. Anderton*, (1 B. & Ad. 450), lays it down that an agent may set up the adverse title of a third person against his principal, "where the principal has obtained the goods fraudulently, or tortiously from such third person."

[COCKBURN, C.J.—It is very hard upon the plaintiff if he has to pay damages to the real owner for the illegal distress, and yet has not the proceeds of the goods to re-imburse himself.]

He is a wrongdoer and ought to be liable to the real owner in damages in respect, at all events, of the legal injury. Here the defendant would be liable to the true owner in tort, or waiving the tort, for money had and received. The agent could not successfully set up the authority of his principal, in answer to an action by the real owner,

Story on Agency, s. 312 (4th ed.) ;
Parebrother v. Ansley, 1 Campb. 342 ;
Adamson v. Jarvis, 4 Bing. 66 ;

[COCKBURN, C.J.—But the real owner has also a right of action against the principal, the plaintiff.]

No doubt ; but plaintiff incurs this by his own wrongful act. If the real owner prefers to sue the defendant, he may.

If the plaintiff's contention is right, the defendant is liable both to the plaintiff and the real owner for the same goods or money.

Defendant has in fact attorned to the real owner, and the proceeds are money in his hands received to the use of the real owner.

[COCKBURN, C.J.—You say the facts here show that the defendant has done what is equivalent to handing over the money to the real owner.]

Yes ; the defendant refuses to pay over the money to his principal, and acquiesces in the notice from the real owner, and must be taken to be defending in his interest. That is the reasonable inference. And under no circumstances could defendant be a gainer, for he is liable to the real owner for the proceeds.

[COCKBURN, C.J.—When the action was brought, and the *jus tertii* was set up, you did not know that the distress was illegal. That fact was proved at the trial, not before.]

But defendant was entitled to rely upon establishing the wrongful distress if he were sued ; and having done this, the result justifies him if he be right in point of law.

Defendant being liable to the real owner in tort, could be sued for money had and received,

Neate v. Harding, 6 Exch. 349 ;
Rogers v. Maw, 15 M. & W. 448.

[BLACKBURN, J.—You may take that for granted.]

Then it follows of necessity that the defendant may set that up as a defence to an action by the plaintiff,

Allen v. Hopkins, 13 M. & W. 94 ;
Bellely v. Reed, 4 Q. B. 511 ;

Story on Bailments, s. 102 (5th ed.).

Cur. adv. vult.

25 FEB. 1865.

BLACKBURN, J., read the judgment of himself, COCKBURN, C.J., and MELLOR, J.—In this case, which was tried before my Brother Willes, the verdict was directed to be entered for the plaintiff for 44l. 12s. 6d., with leave to move to enter the verdict for the defendant, this Court to have power to amend the pleadings in any manner, and to draw inferences of fact. My brother Parry obtained a rule nisi accordingly, which was argued before my Lord, my Brother Mellor, and myself, in last term, when the Court took time to consider of their judgment. From the Judge's notes it appears that goods which belonged to one Robbins, were seized by the plaintiff under a distress for rent of a house alleged to have been demised by the plaintiff to Robbins. The goods had been removed by the plaintiff, and delivered by him

to the defendant to sell as his (the plaintiff's) auctioneer, and the defendant proceeded to sell them in the ordinary way. When the sale was about to begin, Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between him and the plaintiff, and that there was no rent in arrear, and by the notice Robbins required the defendant not to sell the goods, or, if he had sold them, to retain the proceeds for him, Robbins. The defendant proceeded to sell the goods ; but we think that the inference from the evidence is that he did this only because the notice was served so late that he had not time to make any inquiries before the sale came on. He received the proceeds of the sale, but refused to pay them over to the plaintiff. He did not pay the proceeds to Robbins, but from the evidence of Robbins, who was called as a witness at the trial, we draw the inference of fact that the defendant withheld the proceeds from the plaintiff, and defended this action, relying on the right, and by the authority of Robbins, and not hostilely to him.

It appeared on the trial that the relation between the plaintiff and Robbins was not that of landlord and tenant, but of vendor and vendee ; and consequently that the distress was altogether void and tortious. The question, therefore, comes to be whether, under such circumstances, the defendant can set up the *jus tertii* or not ; and we are of opinion that he can do so, and consequently that the rule to enter the verdict for the defendant must be made absolute. We do not question the general rule that one who has received property from another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it ; and we agree with what is said by my Brother Martin in *Cheesman v. Exall* (6 Exch. 346), that "there are numerous cases in connection with wharfs and docks in which, if the party entrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business." But the bailee has no better title than the bailor, and consequently, if a person entitled, as against the bailor, to the property claims it, the bailee has no defence against him ; *Wilson v. Anderton* (1 B. & Ad. 450.).

Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or waiving the tort, had sued for money had and received, the defendant would have had no defence. He was, therefore, compelled to yield to Robbins' claim, and it would certainly be a hardship on him if, without any fault of his own, the law left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law.

Several cases were cited on the argument at the bar, and more might have been cited, such as *Stonard v. Dunkin* (2 Campb. 344), *Gosling v. Birnie* (7 Bing. 339), *Harves v. Watson* (2 B. & C. 540), in which a bailee, who, by attorning to a purchaser of the

goods, has, in effect, represented to him that the property has passed to him (though such was not the fact), and has thereby induced him to alter his position, and pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided; but in all these cases the estoppel proceeded on the representation, which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee, that he may safely accept the bailment; and, so far as any weight is to be given to the representation, it makes against the estoppel. This is pointed out by Parke, B., in *Cheesman v. Exall* (6 Exch. 344), in the case of a pledge, and is indicated as one of the grounds on which the judgment of the Common Pleas proceeded in *Sheridan v. New Quay Company* (4 C. B. (N. S.) 649, 650), which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title; but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz. in *Shelbury v. Scotsford* (Yelv. 22). There, the plaintiff sued in assumpsit against the bailee of a horse, for the breach of his contract to re-deliver it. The defendant pleaded that J. S., the true owner of the horse, took it from the defendant. After verdict for the defendant, the plaintiff moved in arrest of judgment, but "by *Fenner and Yelverton, contra*: for the matter alleged by the defendant does in law discharge the promise, by reason of the former property of the horse in J. S., and then it is as an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants, in any sort depending upon the interest."

In *Wilson v. Anderton* (1 B. & Ad. 457), Little-dale, J. (without referring to *Shelbury v. Scotsford*, but evidently having it in his mind), states the law to the same effect. And accordingly in *Hardman v. Wilcock*, in *Cheesman v. Exall*, and in *Sheridan v. New Quay Company* a bailee was permitted, under circumstances similar to the present, to set up the *jus tertii*. It is true, that in the two first of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up; whilst in the present case there is nothing in the evidence to show that the plaintiff, though a wrong-doer, did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to

the rights of the third person, or fraudulently acting in derogation of them.

We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury v. Scotsford* (loc. cit.),—viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Bellamy v. Reed* (4 Q. B. 517): that "to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim, or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever." Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C.B., in *Thorne v. Tilbury* (3 H. & N. 537; 27 L. J. Ex. 407), that a bailee can set up the title of another only "if he defends upon the right and title, and by the authority of that person." Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences.

Rule absolute.

C. P. } FARNWORTH and Another
9, 10, 27 FEB. 1865. } v. HYDE.

*Marine Insurance—Justifiable Sale of Cargo—
No Notice of Abandonment—Actual Total
Loss.*

Where a cargo is still in specie, but the expense of forwarding it to its destination would exceed its value when so forwarded, and the master rightly sells it under urgent necessity, so that the property passes from the assured, and everything has been done optimâ fide for the benefit of all concerned, there may be an actual total loss, and no notice of abandonment is necessary.

The degree of imminent danger which constitutes such urgent necessity is for the jury.

A ship with a cargo of timber was stranded, and in danger of going to pieces. The master, finding that the cost of sending on the timber to its destination would exceed its value there, sold it as well as the ship for the interest of all concerned, but gave the assured no notice of the sale till it was completed. The jury found that the sale was right and necessary:—

Held (dissentiente BYLES, J., on the ground that, consistently with the evidence, there would have been a margin of profit on the timber at its destination), that the sale constituted an actual total loss of the timber, and that no notice of abandonment was necessary to fix the underwriters.

Declaration against an underwriter on a valued

policy of insurance on timber by "The Avon" from Quebec to Liverpool, for a total loss.

Plea.—Payment into Court of 34*l.* 10*s.*

Replication of damages *ultra*, and issue thereon.

The plaintiffs were timber merchants at Liverpool, and the defendant underwrote a policy of insurance on a cargo of timber for 150*l.*, the plaintiffs being indorsees of the bill of lading.

The policy expressed the goods to be "valued at 1,500*l.* on cargo of wood goods, as may be declared and valued hereafter;" and the goods were subsequently declared at 2,500*l.* "The Avon," with the cargo of timber on board, sailed from Quebec under the charge of a pilot, on the voyage insured, on the 20th of November, 1861; and on the 2nd of December she took the ground at a place called the Brandy Pots, about ninety miles from Quebec, and unshipped her rudder. She subsequently floated off with the tide, but, as she made a good deal of water, the master ran her on a mud bank for the purpose of ascertaining the damage done, and, if possible, reshipping the rudder. All efforts to ship the rudder, however, proved fruitless, and as the ice was rapidly closing round her, the master telegraphed to Quebec for a steamer to tow her back there, but could not get one, as the tugs were laid up for the season, the St. Lawrence being closed from December to April.

On the 8th of December, the master wrote to his owner's agent in Quebec, informing him of the position of the ship, and accordingly Messrs. Cotman & Nesbit, ship-builders, were sent to survey her. They visited her on the 10th and 16th of December, and on their advice the crew, with a few exceptions, were taken back to Quebec and discharged.

After this the weather increased in violence, and the ship drifted from the mud bank, and became lodged amongst rocks and boulders. The ice having been cleared away from her stem, Cotman & Nesbit again surveyed her on the 16th of January, 1862, and condemned her as a wreck. In their opinion the cost of repairing her would exceed her value when repaired; there was danger of her being carried away, with her cargo, by the ice; it was impossible then to trans-ship the cargo; and the cost of landing it during the winter would exceed its value; and therefore they recommended that the ship and cargo should be sold where they were. Their report, embodying the above opinions, was submitted to Mr. Fry, Lloyd's agent at Quebec, and he dissented from it, and advised that the ship and cargo should be left as they were till the spring, on the chance of the ship then floating off. The ship was accordingly left as she lay, and at the end of April a fresh survey was made of both ship and cargo by Messrs. Coker & Valin. They, on the 2nd of May, came to the conclusion that there was but little chance of getting the ship off, and that if she was got off she would not be worth repairing; that trans-shipment of the cargo would be difficult, costly, and dangerous, as it was unlikely a ship could be obtained for

the purpose, and if one was obtained she would have to lie nearly two miles from "The Avon;" and that to raft the timber ashore and get it to the railway would be very expensive, and would involve a loss of some considerable part of the timber; and therefore under the circumstances, they recommended that the ship and cargo should be sold together as they lay.

Accordingly on the 7th of May, the ship, cargo, and stores were sold in three separate lots, the ship fetching 349*l.* 6*s.* 4*d.*, and the cargo 616*l.* 8*s.*; but the nett proceeds of the cargo, after deducting the expenses of the sale, amounted only to 576*l.* 19*s.* 2*d.*; so that, deducting this latter sum from 2,500*l.*, the declared value of the timber, the plaintiff's loss was 1923*l.* 0*s.* 10*d.* No regular notice of abandonment was given to the underwriters, and no notice was given to the assured of the sale till after it was completed. The ship and cargo were both purchased by Messrs. Julien, who despairing of getting the ship off, began at once to dismantle her; but a few days afterwards, taking advantage of a very low tide, they stopped the holes in her, and then, with the aid of a very high tide, they got her off, and towed her with her cargo on board to Quebec. After repairing the ship, they sold her at a loss; but found a purchaser for the cargo at 1,480*l.* The original invoice price of the cargo was 2,255*l.* 0*s.* 2*d.*, and the price actually received by Messrs. Julien, after allowing 63*l.* for timber lost while the ship was stranded, was 1417*l.*

Under these circumstances the plaintiffs claimed as for an actual total loss, at the rate of 76*l.* 18*s.* 10*d.* per cent. on the defendant's subscription, after allowing for salvage; and the defendant paid money into Court to cover a partial loss, at the rate of 23*l.* per cent.

The action was tried before Pigott, B., at Liverpool; and it appeared from the learned Judge's notes, that the cargo, taken at the quantity originally shipped, might have been forwarded to Liverpool with a margin of 209*l.* profit to the owners beyond the estimated cost of getting it there; and that the expense of getting the cargo to this country, was calculated on the quantity of timber originally shipped; but it also appeared, that it was left to the jury to say, what quantity of timber would have been lost in so trans-shipping and forwarding it. The jury found that the sale of both ship and cargo was justifiable, and a verdict was entered for the plaintiffs for 80*l.* 18*s.* 3*d.*, the full amount claimed by them beyond the sum paid into Court.

Edward James, Q.C., in last Michaelmas Term, obtained a rule to set this verdict aside, and enter it for the defendant, or for a nonsuit, pursuant to leave reserved on the grounds, first, that there was no evidence of a total loss; and secondly, that there was no evidence of a partial loss exceeding the sum paid into Court; or to reduce the damages to the sum actually due as for a partial loss.

Brett, Q.C., Mellish, Q.C., and C. Russell, now showed cause.

It was clearly necessary to sell the ship, and that is a material point in considering whether it was right to sell the cargo; the surveyors said you must sell the ship, and you will get a much better price by selling both together. It was not only right to sell the cargo, but to sell it at that particular time, both on account of the great expense of doing anything else with it; and of the imminent danger of its being lost. The sale was justifiable as against the underwriters and all parties concerned. Notwithstanding the existence of the cargo in specie, there was ample evidence of an actual total loss; it was a total loss without notice of abandonment, as notice of the necessity of the sale and of the sale itself, was given at the same time.

Rosetto v. Gurney, 11 C. B. 176; 20 L. J. C. P. 257.

There is no question here of what an uninsured owner would have done at the port of distress, for the case of goods is not like the case of a ship, and there is the additional element of the market at that port,

Reimer v. Ringrose, 6 Exch. 263; 20 L. J. Ex. 175.

The question is, what a reasonable merchant in such a position would have done, and whether, under all the circumstances, it was in a mercantile sense, estimating cost and risk, practicable to send the cargo on. If the cargo was justifiably sold at the port of distress, and no notice was given to the assured till the sale was complete, there was nothing for him to abandon: the sale was on his behalf, the property passed, and he would have no opportunity of dealing with the goods at all. The point is to a great extent without authority, but, on principle, notice of abandonment must be held unnecessary,

Roux v. Salvador, 3 Bing. N. C. 266;

Knight v. Faith, 15 Q. B. 649;

Cambridge v. Anderton, 2 B. & C. 691;

Idle v. The Royal Exchange Assurance Company, 3 Moo. 115; s. c. 8 Taunt. 755;

King v. Walker, 33 L. J. Ex. 325;

1 Arnould on Marine Insurance, 241, § 95 (last ed.).

But even if it was an average loss, there is evidence of loss beyond the sum paid into Court, though the principle on which an average loss, under such circumstances, is to be estimated, is even a more unsettled point than the last,

Arnould, 990, § 363 (2nd ed.);

2 Phillips on Insurance, § 1463;

Stevens on Average, 40 (2nd ed.).

Edward James, Q.C., and *T. Jones*, in support of the rule.

The basis of the argument on the other side is the actual total loss of the ship, and then they put forward as a necessary consequence the actual total loss of the goods. We deny the first proposition, and say that even if it were so, the second need not follow. The ship was capable of repair, and that being so, the sale

cannot be justified, and there was no actual total loss of her.

To constitute an actual total loss of the goods, their specific character must be gone: they were in specie, and should have been sent on, and the costs of so doing might have been an average loss. To constitute a constructive total loss of the goods, the assured must determine the risk without an actual total loss. As the goods here might have reached their destination in specie, and there was a chance of their recovery, there should have been a notice of abandonment to constitute a total loss,

Arnould, § 1025 (2nd ed.);

Fleming v. Smith, 1 H. of L. Ca. 513.

[SMITH, J.—The notice should also be in time to be of some use.

[ERLE, C.J.—Suppose a cargo left high and dry on the Cannibal Islands, where it would not be advisable to go for the purpose of taking it away.]

The sale is not an essential in the ingredients which go to make a total loss.

If it was an average loss, there was no right to charge contingent expenses,

Stewart v. Steele, 5 Sco. N. R. 517.

Cur. adv. vult.

27 FEB. 1865.

MONTAGUE SMITH, J., now delivered the judgment of the majority of the Court (viz., *Erle, C.J., Keating and Smith, JJ.*), as follows:—

This action was on a policy on timber in the ship "Avon," from Quebec to Liverpool. The "Avon" was frozen-up in the passage down the St. Lawrence, and, after survey, the ship and the cargo were sold by the master to one purchaser at separate sales. At the trial the jury found in effect—first, that the sale of the ship was justified, on the ground that the cost of the repairs would have been greater than the value of the ship when repaired; and secondly, that it was right to sell the cargo, because it was not practically possible, in a mercantile sense, to have carried it to its destination; that is to say, because the costs of bringing the cargo, added to the amount of depreciation, would not have left any appreciable margin of profit to the owners. Upon these findings the verdict was entered for the plaintiff for a total loss; and the rule nisi to alter the verdict, and enter it for a partial loss, on the ground that there was no evidence on which the finding of the total loss could be supported, is now to be disposed of.

Upon the first question, relating to the ship, we have to say whether there was evidence to support the finding that the sale was justifiable; and our answer is in the affirmative. We do not propose to state the evidence at length; but, taking the report of the surveyors on the 2nd of May, and the statement of Julien, who purchased on the 7th of May, we think there was evidence for the jury that the ship was in imminent danger of destruction, and that a sale

appeared to afford the only reasonable hope of saving any part of her value.

Then upon the second question, relating to the cargo, we have to say whether there was evidence to support the finding that it was right to sell it, because the cost of bringing the whole or any part of it to its destination would have exceeded the value thereof there; and our answer is again in the affirmative. We are not called on to say on which side, in our opinion, the balance of evidence inclines. If there was reasonable evidence for the jury, the evidence is to stand; and we think there was.

We have been embarrassed by the estimate appended in sequel to the Judge's notes, by which it appears that a comparison of the supposed cost of carrying the timber to its destination, with the supposed value thereof there, showed a possible profit of 209%. That estimate, taken alone, seems at first sight inconsistent with the finding in respect of the cargo; but, as this estimate is followed by the note that the jury might say if anything was to be deducted for loss of quantity, we consider that there was evidence to the effect, that in the process of saving the timber there would probably be a loss of 25 per cent. in quantity; and, although it might follow that in the case of a diminution of the quantity of timber a deduction should be made for some of the estimated expenses, such as freight, in the like proportion, yet some of the expenses might be a constant quantity, subject to no deduction, such as the expense of bringing labourers to make rafts. All this was for the jury; and we cannot say that there was not evidence to support the verdict.

Then, upon the facts so found by the jury, is the plaintiff entitled to recover for a total loss? As the cost of carrying the cargo to its destination would have been greater than its value on arrival, it is not disputed that there would have been a constructive total loss, if notice of abandonment had been given: see *Rosello v. Gurney* (11 C. B. 176), and *Reimer v. Ringrose* (6 Exch. 263). But no such notice was given; and we are therefore to say what is the legal effect of this sale so found by the jury to have been right and necessary. We answer, that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him, as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale, where the ship or cargo might have been saved wholly or partially, if notice of abandonment had been given; but we are also aware that, if a right sale, such as was here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give a notice of abandonment, and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandon-

ment. It must rest with the tribunal that has to deal with the questions of fact, to guard against fraud and wrong; and the sale by the master ought not to be found right or valid, unless it was the best that could be done for the interest of those concerned, with reference to all the circumstances, including the time and manner of sale, and so, in a mercantile sense, necessary.

The opposing considerations for and against requiring notice of abandonment where the property insured exists in specie are stated in *Roux v. Salvador* (3 Bing. N. C. 266; 4 Scott, 1,) and *Knight v. Faith* (15 Q. B. 649, 657). In *Roux v. Salvador* the policy was on hides from Valparaiso to Bordeaux. The ship was forced into Rio, and decomposition of the hides began by reason of a peril of the sea; and, because it was found not to be practicable to carry them to their destination, on account of the expected progress of decomposition, they were sold at Rio; and the loss was held to be total, although there was no notice of abandonment. The judgment is of a Court of Error—it is powerful in reasoning and in learning; and, although it relates to a cargo of perishable goods in the course of decomposition, yet it extends to all cases where the adventure is brought to an end by a peril, and the goods are taken out of the power of the assured in the course of their voyage, either by physical laws working decomposition, or by political laws working detention and sale by a Court, or by circumstances of distress and danger creating what may be described as a mercantile necessity for a sale. The present case is an example of such circumstances, where a stranded ship was in danger of falling to pieces, and the expense and risk of rafting the timber, and reloading it on trans-shipment, and carrying it to its destination was supposed to exceed the value of the cargo when there. Such a case seems expressly included in the part of the judgment in *Roux v. Salvador* (3 Bing. N. C. 279), where it is said that "if goods damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, in the case of perishable goods, in such a state that they cannot in safety be reshipped; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, they can never be brought to their original destination; in any of these cases the circumstance of their existing in specie at that forced termination of the risk is of no importance; the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or other insuperable necessity." The judgment in *Knight v. Faith* (15 Q. B. 657,) accords with *Roux v. Salvador* in holding that there may be a total loss without abandonment, when there has been a right sale caused by urgent necessity, with full proof that everything was done *optima fide*, and for the real benefit of all concerned. There is an apparent difference of opinion in these two decisions as to the

degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury; and it is useless to attempt to define a degree without a standard for measure. Lord Campbell observes on the degree of fraud; but those observations are relevant to the caution required from the jury, not to the law of the case when the necessity for the sale has been properly formed.

In *King v. Walker* (33 L. J. Ex. 325), it was not necessary to decide that a valid sale from necessity was an actual total loss without any notice of abandonment; but the Court clearly sanctioned the rational principles respecting the effect of a valid sale from necessity laid down in *Roux v. Salvador*, saying (page 326), "it may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no reasonable man would incur, and is therefore properly, and in a sense, necessarily, sold for the old materials."

In these three cases all the authorities relating to abandonment are fully reviewed; and no useful object would be gained in repeating the review. We consider that we act on the principles laid down in *Roux v. Salvador* in holding that the jury, finding that the sale was right under the circumstances in evidence before them, found that there was an actual total loss, with benefit of salvage, although the cargo existed in specie at the time of the sale, and there was no notice of abandonment. The above is the judgment of the Lord Chief Justice, my Brother Keating, and myself. My Brother Byles assents to it, subject to the remarks upon the preliminary point which I am about to read.

BYLES, J.—I agree with my Lord and the rest of the Court that, if the cargo had been sold by the captain of the vessel, because the expense of forwarding it to its destination would have exceeded its value when so forwarded, it was rightly sold; that a sale under such circumstances would have changed the property; and that there would have been not merely a constructive but an actual total loss of the timber. I also agree that in the case of such an actual total loss no notice of abandonment is necessary. But, in all cases of alleged constructive loss, where the captain takes upon himself to sell the ship, and still more so when he sells the cargo, the necessity of so doing ought to be strictly proved, and the jury are not at liberty to act on conjecture.

It is plain, on the figures appended to the report

of the learned Judge, that the expenses of bringing the cargo to Liverpool would not have equalled the value of the cargo when brought there, in its integrity, by 209*l*. The jury have found that there would have been a diminution of the quantity of timber to this extent, and therefore that the expenses would have equalled the value of the diminished cargo, which alone could have been actually brought home. But I can find no evidence on the Judge's notes to support this amount of deduction from the original quantity of the cargo. It may be that there would be some deduction, but it may also be that, if any, there would be a very much smaller deduction.

Again, on the assumption that such a diminution of quantity were proved, the expenses of bringing home the cargo should be calculated on the diminished quantity; but they are all calculated on the larger quantity of timber contained in the whole original cargo. It is possible (but I see no evidence to prove it) that the expenses of landing and rafting would be the same, whether any portion of the cargo were lost or not. This might depend on the period at which the loss of quantity took place, of which there is no evidence that I am aware of. But, assuming the landing and rafting to be constant quantities, yet the freight, both original and additional, is at so much per load, and is calculated by the assured on the quantity contained in the entire cargo. But the freight actually payable for sending a smaller quantity would be less. Therefore, in calculating the expense of sending the diminished cargo home, too much is charged for freight. But any deduction from the charge for freight makes the sale unlawful, and indeed destroys the claim for a constructive total loss; for it does not appear on the figures that, even if the freight could be charged on the original quantity, it would do more than bring the expenses of sending home the cargo up to the value of the cargo so sent home: no excess of charge beyond the value of the cargo is shown.

I much regret that on this preliminary question I am unable to concur with the rest of the Court; but though I fear I must be in error, I do not feel at liberty to yield my opinion; for, if it be correct, the plaintiff will still be entitled to hold his verdict to the extent of a partial loss, the amount of which loss is by agreement to be settled by competent parties. And, on a careful consideration of the evidence, I feel strongly that this result would be more likely to advance the real justice of the case than the verdict as it now stands.

Rule discharged.

EQUITY.

House of Lords.

17, 20, 21 FEB.

16 MARCH, 1865.

TAPLING v. JONES.

Present—THE LORD CHANCELLOR, LORD CREANWORTH,
and LORD CHELMSFORD.

*Easement—Ancient Lights—Prescription Act,
2 & 3 Will. 4, c. 71, s. 2—“Absolute and
Indefeasible Right”—Invasion of Privacy.*

A purchased a three-storied house with an ancient light on each story, which abutted on B's premises. A then altered and enlarged two of the ancient lights, leaving the third unaltered. He also built up two new stories, with windows overlooking B's premises. B then built up a wall, obstructing not only the new windows, but also the unaltered light, it being impossible for him to obstruct the new lights without also obstructing the old.—

Held, that B was not entitled to erect such wall.

Since the Prescription Act, the right to lights which have been enjoyed during the prescribed period does not rest upon any implied grant, but is an absolute and indefeasible statutory right.

The invasion of a neighbour's privacy by constructing new windows overlooking his premises, is not a wrongful act, and neither confers any new rights upon the servient tenement, nor forfeits any of the existing rights of the dominant tenement.

Renshaw v. Bean (18 Q. B. 112); and Hutchinson v. Copestake (9 C. B. (N. S.) 863); overruled.

Error from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Common Pleas, in an action brought by the respondent, the plaintiff below, against the appellant, for obstructing certain ancient lights. The cause was originally tried before Cockburn, C.J., at the London sittings after Hilary Term, 1859, when a verdict was found by consent for the damages claimed, subject to a special case, the material statements in which were to the following effect:

The respondent was a wholesale dealer in silk, carrying on business at Nos. 107, 108, and 109, Wood Street, Cheapside. He had for several years before 1857 carried on his business at Nos. 108 and 109, Wood Street, but he first acquired possession of the premises No. 107 in 1857, having purchased them in the month of July in that year. Up to the time when the plaintiff acquired possession of the premises No. 107, they were used and occupied as a public house known by the

sign of “The Magpie and Pewter Platter,” and were in line with, and next adjoining to, Nos. 108 and 109. The premises Nos. 107, 108, and 109, abut on the rear or west side upon the east side of certain premises fronting in Gresham Street West, numbered 1 to 8, the property of the appellant.

No. 107, Wood Street, when purchased by the respondent, was a three-storied house with one window in each story, and it was admitted that these windows were then ancient windows. Shortly after having purchased No. 107, the respondent made various alterations in the premises, to make them correspond with his warehouses, Nos. 108 and 109, and in particular he altered two of the windows by lowering them. One of the lowered windows became about one foot longer than before, the other remained of about the same size, and both occupied parts of the old apertures. The third ancient window, however, was left unaltered. The respondent also built two additional stories to No. 107, with windows in each of them, the window in the fifth, or attic, story, extending across the whole width of the building. These new windows were so situated that it was impossible for the owners of the Gresham Street property to obstruct them without obstructing, to an equal or greater extent, the unaltered window, and that portion of the altered windows which occupied the space of the ancient windows.

After these alterations and additions in the Wood Street windows had been completed, the appellant proceeded to erect a new warehouse on the Gresham Street property, and he built up the east wall to such a height as to obstruct all the windows in No. 107, Wood Street. Part of the wall formed the east side of his warehouse, the residue was a mere blank wall built up to prevent the respondent acquiring any new easements in respect of his new windows. A correspondence ensued between the parties respecting this wall, and as the appellant insisted on his right to block up the new windows, the respondent bricked up the new windows and restored the altered windows to their former size and position, and then insisted on the appellant pulling down his wall. The appellant having declined to do so, the present action was brought. The case admitted that the new upper windows in No. 107 could not have been obstructed in a more convenient manner than by building up a wall of sufficient height on the appellant's premises.

Upon the first point, namely, whether the appellant was originally justified in erecting the obstruction complained of, the Court of Common Pleas were unanimous, being of opinion that he was.

On the second point, namely, whether he was justified in maintaining the obstruction after the respondent had restored his lights to their original state, the Court was divided in opinion, Mr. Justice Keating and Mr. Justice Byles holding that he was, and the Lord Chief Justice and Mr. Justice Williams holding that he was not (11 C. B. (N. S.) 283.

The Court of Exchequer Chamber were also divided in opinion, Mr. Baron Bramwell and Mr. Justice Blackburn thinking that the original construction was not justifiable, Mr. Justice Wightman and Mr. Justice Crompton thinking that the original construction was justifiable, but that it ceased to be so when the respondent abandoned his new lights; and the Lord Chief Baron and Mr. Baron Martin thinking that the original construction having been lawful, its continuance did not subsequently become unlawful (12 C. B. (N. S.) 826.

The Attorney-General, Q. C., and Archibald, for the appellant, after pointing out that the erection of the upper story involved a much greater overlooking of the appellant's property, and that the additional stories would operate to obstruct any lights to which the appellant was entitled in his new wall, and that it would be most serious for him if he could not obstruct the new lights, which would become valid easements at the end of twenty years, without erecting a wall: yet he was to be obliged to pull that wall down, whenever the respondent chose to restore his windows to their old state, having to re-erect his wall again as soon as the respondent took the bricks out of his new windows—a perpetual see-saw, in which the dominant tenement must win—argued,

On the first branch of the case, that servitudes of light and others, by the Roman law as well as by our own, were based upon implied grants to be inferred from usage.

It is a sound proposition, that such grant, consent, acquiescence—be it what it may, is to be measured by the user which is the evidence of it, and is not to be extended to rights of which there has been no user. Length of user is not held by our law to confer an actual right, but is held only evidence of a right.

The Prescription Act, 2 & 3 Will. 4, c. 71, introduces no new principle, but only gives a new rule of evidence,

Bright v. Walker, 1 Cr. M. & R. 211.

As to the old theory, before the Prescription Act,

Daniel v. North, 11 East, 372;

Barker v. Richardson, 4 B. & A. 579.

The continuance of the old right involves the continuance of the conditions under which that right arose. If I agree to allow a man to erect a building with a certain window overlooking me, is it consistent with reason or justice that he should be at liberty to surround that window with a variety of others totally

unauthorised, and to make my consent to the one window a bar to my right to prevent him establishing against me those other lights, to which I have not agreed? The effect of an alteration in the dominant tenement, which, if allowed, would increase the liabilities of the servient, is to destroy the old easement, unless the servient owner can defend himself from the new liability without interfering with the old. What he has consented to, is not to be made a shield for establishing against him a right to which he has not consented: and, if this is attempted to be done, he is released from his grant, and is entitled to obstruct the old easement, if without that he cannot obstruct the new. Compare,

Luttrell's Case, 4 Rep. 87a.

The first case directly in point is,

Cherrington v. Abney, 2 Vern. 646:

The next is

Com. Dig. Action on Case for Nuisance, C. p. 421 (5th ed.).

Martin v. Goble, 1 Campb. 320, 323,

shows that one must regard all the circumstances to see what was the grant, what the consent.

Dougall v. Wilson, 2 Wm. Saund. 175 a,

Cotterell v. Griffiths, 4 Esp. 69,

may be quoted against me, but cannot be extended or relied on.

Chandler v. Thompson, 3 Campb. 80,

is a *Nisi Prius* case, and not easily reconcilable with more recent decisions.

Thomas v. Thomas, 5 Tyr. 810,

contains a dictum which may seem against me, but is not necessarily so. In

Garritt v. Sharp, 3 Ad. & E. 325,

it is said "a party may so alter the mode in which he has been permitted to enjoy this kind of easement, as to lose the right altogether."

Blanchard v. Bridges, 4 Ad. & E. 176,

proves nothing.

Renshaw v. Bean, 18 Q. B. 112,

is supposed to have settled the law, and your Lordships will probably be asked to reverse it.

[LORD CHELMSFORD.—If a man pulls down his house and rebuilds it, do you say he must have the windows of the new house in exactly the same places as the old ones?]

Substantially they must. There must be no material alteration; what amount of variation will be material must depend on the case,

Wilson v. Townend, 1 Dr. & Sm. 324.

So again the same Judge in

Davies v. Marshall, 4 L. T. (N. S.) 105.

Cooper v. Hubbrick, 30 Beav. 160,

differs from *Renshaw v. Bean*, but was disapproved of in

Hutchinson v. Copestake, 8 C. B. (N. S.) 102;

affirmed 9 C. B. (N. S.) 863:

The opinion of the majority of the Judges was acquiesced in by Wood, V.-C., in

Weatherly v. Ross, 1 H. & M. 849.

So

Gale's Easements, 477 (3rd ed.).

On the second branch of the case, assuming the first point to be decided in our favour, the question is, did the respondent's proceedings amount to an abandonment of his old rights, or only to a suspension?

If something is done, which is clearly temporary, that is a suspension; but if a thing is done which cannot be done *animo resumendi*, as was the case here, that is an abandonment,

Liggins v. Inge, 7 Bing. 682.

Stokes v. Singers, 8 El. & Bl. 31,

shows one cannot go back to his former rights if the other party has acted on the alteration.

Everything here pointed to a permanent alteration. It lay on the respondent to show that the annoyance against which we had a right to protect ourselves, as we did, was not meant to be permanent,

Gale, p. 500, as to the Civil Law, p. 483-4.

So Vice Chancellor Kindersley, in

Martin v. Headon, 11 L. T. (N. S.) 590.

Sir Hugh Cairns, Q. C., and *Cleasby, Q. C.*, for the respondent, were not called upon.

16 MARCH, 1865.

THE LORD CHANCELLOR, in giving judgment, said: The 3rd section of the Act 2 & 3 Will. 4, c. 71, provided that "when the access and use of light to and for any dwelling-house, workshop, or other building should have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto should be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it should appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." Upon that section it was material to remark that the right to lights which had been enjoyed for the prescribed period was thereby made a matter *juris positivi*, a matter depending on enactment and not on any presumption of grant or fiction of consent: a written consent might be used for the purpose of barring the right that would otherwise accrue from an uninterrupted user during the prescribed period, but no consent need be implied for the purpose of establishing the right. Error had arisen in some cases from the fact of the Courts having treated the right ever since the Act as originating in a presumed grant or licence. That view was mistaken, as by the Act the right to light after an enjoyment of twenty years was declared "absolute and indefeasible," and such right could neither be affected by any temporary suspense of enjoyment not amounting to abandonment, nor by any attempt to extend the right beyond that which had been declared by the statute to be not liable to be impeached. The learned Judges in the Courts below in speaking of the right of the servient owner to obstruct the acquisition

by the dominant owner of a new easement, had made use of an expression which had a tendency to mislead. If A built new windows overlooking the land of B, B gained no new right thereby. B was at liberty, as he was before the erection of such new windows, to build anything he liked upon his own land, unless that right had in any way been lost, but he gained nothing new. The invasion of a neighbour's privacy, by opening new windows overlooking him, was not a wrongful act in the eye of the law, and conferred no remedy. A may build a factory with one hundred windows overlooking B, yet B will have nothing but what he had before,—viz., the right to build up anything which may exclude those windows. If the owner of a house with a window in it, the right to which had, under the statute, become absolute, were to open new windows, such new windows would not affect his absolute and indefeasible right to the old windows, inasmuch as the new windows were no injury in law to the servient owner, who might build up anything he was otherwise entitled to, but who might not build up the old windows. His Lordship was unable to accept the reasoning of the learned Judges in *Renshaw v. Bean* (*loc. cit.*), and *Hutchinson v. Copestake* (*loc. cit.*), according to whom the law was, that if the owner of an ancient light opened new windows, so that a neighbour could not obstruct the new windows without obstructing the old, the latter was at liberty to do so. But there the opening new windows was treated as a wrong, and the Court had asked how could the respondent complain of that which was necessitated by his own wrongful act. That might mean either that the opening a new window was an act wrongful in itself, or that it was sufficiently wrongful to deprive the respondent of his rights under the Act. His Lordship, after referring to the admission that one window remained unaltered, and to the Judge's opinion that the erection of the appellant's wall was lawful at the beginning, said that, in his opinion, the appellant's wall, so far as it obstructed the unaltered ancient window, was wrongful from the first, and that he could not concur in the view that the wall was lawful at first, but became wrongful afterwards. The judgment must be affirmed, but not on the grounds relied upon by the Court below.

LORD CRANWORTH said: The question was, Whether the appellant was justified in erecting a wall obstructing the ancient window of the respondent? His Lordship, referring to the decision in *Renshaw v. Bean* (*loc. cit.*), said he agreed with the Lord Chancellor that, whatever might have been the law before the Act, the right to light through ancient windows now rested on the Act, and that alone. He thought that the respondent's rights were, by the Act, "absolute and indefeasible:" that the appellant's wall interfered with those rights, and could not be justified. It had been alleged, that material altera-

tions had been made by the respondent, but there was really nothing in that, and he was unable to see how the appellant could thereby claim to block up the ancient window. If opening the new window had been an act wrongful in itself, like building a wall across a public way, then some new rights might have accrued to the appellant; but such was not the case. There was a confusion of terms in speaking of the "right to obstruct new windows." There was merely the right to build: and if thereby new windows were obstructed, so far there was no wrong. Suppose a house owned in flats: If the owner of one of the upper flats opened a new window, would a neighbour be at liberty to obstruct the lower flats, because he could not otherwise block up the new light? Or even, again, if the owner of the lower flat were to purchase the upper flat, with such new window in it, within twenty years from its being opened, would the neighbour then be allowed to build him up? Clearly not. No one could interfere with the absolute and indefeasible right of another, without some wrongful act on the other's part to justify him—which the opening a new window was not. That conclusion was manifestly inconsistent with the decisions in *Renshaw v. Bean* (loc. cit.), and *Hutchinson v. Copestake* (loc. cit.). He was sorry to be obliged to say so, but he considered those decisions erroneous: and, in fact, they had been dissented from by two of the learned Judges below. He was clearly of opinion, that the wall was wrongful *ab initio*.

LORD CHAMSFORD said: The first point, namely, whether the wall had a lawful origin, directly brought in question the decision in *Renshaw v. Bean* (loc. cit.). The majority of the learned Judges below had used the word "right" incorrectly, when they spoke of the respondent as exceeding his "rights" by opening new windows; opening new windows never was an injury in the eye of the law, and the only remedy of the person, whose privacy was invaded, was to build up; but as it was hard for the owner of the windows to be exposed for ever to the chance of being built up, the Courts for the sake of maintaining established advantages, and for quieting possession, had implied a grant after twenty years uninterrupted enjoyment; but now the right was made "absolute" by the Act, which so far restricted the adjoining owner in the use of his property, that he was not at liberty to obstruct that right which the Act made indefeasible. Perhaps if a clear intention to abandon the right to an ancient window were shown, then a neighbour might be at liberty to build the window up, but it would be hard to hold a person to have abandoned a right by trying to extend it; nor could there be any forfeiture here, because opening the new window was not a wrongful act. His Lordship approved of the remarks of Mr. Baron Alderson in *Thomas v. Thomas* (2 Cr. M. & R. 39), where he said: "How does the plaintiff by claiming more than he lawfully

may, destroy his title to that which he lawfully may claim? It has been held in the case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window. If the act of the defendant is injurious to the plaintiff's original right, it is not the less so because it is injurious also to a further right which the plaintiff claims!" The decision in *Renshaw v. Bean* (loc. cit.), could not be supported. The determination of the first point in the respondent's favour, prevented the second point from arising.

Minuta.—Judgment affirmed.

Lord Chancellor. { Re THE MOSELEY GREEN
16, 29 NOV. 1864, COAL AND COKE COM-
22 MARCH, 1865. PANY (Limited).
BARRETT'S CASE (No. 2).

Joint-Stock Company—Winding-up—Set-off—
21 & 22 Vict. c. 60, s. 17.

B was surety for a sum of 7000L., due from C to L. Payment was also secured by a mortgage from C to L. The mortgaged estate was sold by C to the Moseley Green Company, who covenanted to pay the mortgage debt. Afterwards, the company gave L, the mortgage, a promissory note for the amount; but, before it arrived at maturity, a winding-up order, under the Joint-Stock Companies Act, 1856 and 1857, had been made. After the winding-up order L transferred the mortgage and securities, and indorsed the note, to X. B, having been settled on the list of contributories, paid X, and then upon the mortgage was transferred, and the note indorsed, to him:—

Held, that B was entitled to set-off the sum due on the note against a call made upon him:—

Held also, that to the extent of the amount so set-off the mortgage was satisfied for the benefit of the company.

By the articles of association of the Moseley Green Coal and Coke Company (Limited), incorporated under the Joint-Stock Companies Act, 1856 and 1857, it was declared that the company should carry on the business of digging and mining for coal, and of converting coal into coke, and selling the coal and coke; and for that purpose should purchase a lease, or take sets, or assignments of leases or sets, or enter into agreements for the purchase or leasing, of any coal-pit or mine, or coal under the surface of any land, and such lands, buildings, and machinery, for such consideration, either in shares or money, and at such rent, royalty, or other reservation, as the directors, under the powers thereafter given to them, should determine. And it was declared that, for the purpose of the company's business, the directors should have full power to purchase or take any lease or assignment

of a lease or sett of any coal-pit or mine or coal under the surface of any land, and such land, buildings, machinery, and conveniences as they might think fit, either in their own name or in the names of any person or persons they might please, upon such terms and under and subject to such rents, royalties, provisions, and conditions as they might judge proper and for the benefit of the company.

The 46th article directed that all bills of exchange or promissory notes should be accepted, drawn, or indorsed by two of the directors, and counter-signed by the secretary, and should be impressed with the company's seal.

In pursuance of these powers the directors contracted for the purchase of certain coal mines, of which, subject to a mortgage to one Lea, Mr. Corbett was owner. The mortgage to Lea was to secure 7000*l.*, and Messrs. Barrett and Bennett were sureties for the due payment of the 7000*l.*, and as such had given Lea their promissory note for that amount.

By a deed, dated the 6th of March, 1862, these mines were conveyed to the company subject to the mortgage to Lea, which the company covenanted to pay and to indemnify Mr. Corbett. Subsequently, the mortgage debt still remaining unpaid, the company were required by Lea to give him, and with Messrs. Bennett and Barrett's consent they did give him, a promissory note for 7000*l.*, duly drawn, dated the 5th of September, 1862, and payable on the 7th of November, 1862.

On the 30th of October, 1862, an order for winding-up the company was made by the Court of Bankruptcy. On the 23rd of February, 1863, Miss Barrett paid Lea the amount of the debt due to him, and took a transfer of his mortgage. The promissory note of Barrett and Bennett, and that of the company were at the same time indorsed and handed over to her.

Mr. Barrett's name had been settled on the list of contributories to the company, and on an application being made to the Lord Chancellor to strike it off, his Lordship, on the 8th of June, 1864, directed that it should be retained (see 4 N. R. 308).

On the 13th of June, 1864, Miss Barrett, in consideration of Mr. Barrett's promissory note for 7000*l.*, executed an agreement to transfer the mortgage to him, and indorsed to him the company's note. At the same time, Bennett and Barrett's note was delivered up to Mr. Barrett.

By the 17th section of 21 & 22 Vict. c. 60, an Act passed to amend the Joint-Stock Companies Acts of 1856 and 1857, it is enacted, that "In fixing the amount payable by any contributory in pursuance of the Joint-Stock Companies Acts or any of them, he shall be debited with the amount of all debts due from him to the company, including the amount of the call, and shall be credited with all sums due to him from the company, on any independent contract or dealing between him and the company, and the

balance, after making such debit and credit as aforesaid, shall be deemed to be the sum due."

After Mr. Barrett's name had been finally settled on the list of contributories, he claimed to set-off the sum due on the company's promissory note against the amount of his call. The claim was disallowed by Mr. Commissioner Goulburn, and Mr. Barrett now appealed against this decision.

Cole, Q.C., and *Swanston*, for Mr. Barrett.

The objection that will be raised against Mr. Barrett's claim is, that he was not a creditor of the company at the time of the winding-up order, but became such by subsequent transactions. But these were the consequence of his original suretyship for the debt due to Lea, which existed before the winding-up order, and they sprang from the right, which a surety, paying off the principal, has to the benefit of the collateral securities.

Willcock, Q.C., and *Roxburgh*, for the official liquidator.

1st. If a contributory, by taking a transfer of a note, acquires a right of set-off, he does, in fact, wherever the sum due on his call exceeds the sum due on the note, obtain the full amount of the latter. In the present case Lea, from the date of the winding-up order, was entitled to a dividend only in respect of the note, and to obtain even that on the full amount, he must have surrendered his mortgage. Barrett who derives title from Lea through an assignment made after the winding-up order, cannot stand in a better position than his transferor. The 17th section of the 21st & 22nd Vict. c. 60, has no application, since it relates only to sums due to the contributory on a contract or dealing between him and the company. In respect of this note there never was any contract or dealing between Barrett and the company.

They cited and commented upon,

Marsh v. Chambers, 2 Strange, 1234 ;

Ex parte Hale, 3 Ves. 304 ;

Hawkins v. Whitten, 10 B. & C. 217 ;

Dickson v. Cass, 1 B. & Ad. 343 ;

Dickson v. Evans, 6 T. R. 57 ;

12 & 13 Vict. c. 106, s. 171.

2nd. Barrett could not have proved in Bankruptcy under

12 & 13 Vict. c. 106, s. 173,

since he was a surety or liable for a debt, not of the company, but of Corbett ; and the practice in Bankruptcy applies in the present case, as no orders inconsistent with it have been made under

19 & 20 Vict. c. 47, s. 99.

At the close of the respondent's case,

THE LORD CHANCELLOR said : It appeared that, at the date of the winding-up order, Lea was the holder of the note in question ; and there could be no doubt that he was a *bona fide* creditor of the company. Subsequently to the winding-up order, first of all, Miss

Barrett, the sister of the present appellant, paid off Lea, and took a transfer of his mortgage; and, at the same time, the promissory note was indorsed and delivered over to her. Then, by a contract between her and her brother—the *bona fides* of which was not impeached, but with regard to which it was said that the only consideration was the promissory note of the brother—Miss Barrett agreed to transfer the mortgage to her brother, and at the same time handed over to him the promissory note. Now, was that a dealing and a transaction then for the first time created and made; or was the brother, in respect of his antecedent suretyship for that 7000*l.*, entitled to pay off Lea's mortgage of 7000*l.*, and to claim the benefit and possession of the securities held by Lea? At present, he was disposed to attribute the payment made by the appellant to that original liability which he had contracted before the winding-up order.

Then the question was reduced to this—If an individual is surety to a creditor of a company antecedent to the winding-up order, and afterwards in respect of that suretyship pays the debt, and by reason of that payment becomes entitled to the benefit of the securities held by the creditor, amongst which securities is a promissory note of the company validly and duly given; is he, or is he not, in respect of the holding or ownership of that promissory note, entitled to set it off against any demand that may be made against him by the company? His Lordship thought that he stood precisely in the situation in which the creditor of the company, being the holder of the note, stood at the time when the winding-up order was made. He stood remitted to that time by virtue of what he had done under a contract made and entered into anterior to that time. His right to set off depended upon the state of things existing at the time of the winding-up order, and was not granted in consequence of any subsequent contract, dealing, or transaction. This was the view which the Court was at present inclined to take, but the case would stand over for a few days, in order to give the counsel for the respondent the opportunity of investigating the cases upon the subject, and showing that the view above-expressed was one that could not be maintained.

28 Nov. 1864.

Willcock, Q. C., now mentioned the following cases,

Dobson v. Lockhart, 5 T. R. 133;

Ex parte Stephens, 11 Ves. 24;

Ex parte Hanson, 18 Ves. 282;

Vulliamy v. Noble, 3 Mer. 593;

Collins v. Jones, 10 B. & C. 777.

THE LORD CHANCELLOR said: The general principle referred to was this; if Barrett had been the holder of the note at the time of the winding-up order, he would have been entitled to a set-off. But it was said, that in these cases, just as in bankruptcy, it would be injurious to permit persons to acquire such a right by buying up claims after the order. But was there not

an exception in a case where, although the actual ownership was subsequent, yet it was the result of an antecedent transaction? That principle appeared to have been recognised in the case of *Collins v. Jones* (*loc. cit.*). There the defendant Jones had, before the bankruptcy, indorsed a bill accepted by the bankrupt. After the bankruptcy the bill came to maturity, and was dishonoured, whereupon Jones paid the amount to the holder, and received back the bill. In an action brought against him by the assignees, he was allowed to set off the amount which he had thus paid. The material question in the present case was, does the contract of suretyship entered into before the winding-up order, or do the equitable results of that contract, give that effect to a consequent possession after the order, which entitles the possessor to refer his possession to a time antecedent to the order? In his Lordship's opinion, it did. A *bona fide* contract gave the appellant the note now, but it was anterior, and therefore he might refer his possession back to the antecedent time, and accordingly he was entitled to a set-off. His Lordship added, that he would examine the papers, and if he saw nothing to induce him to change his opinion, the order of the Commissioner would be discharged, and it would be declared that the appellant was entitled to set off the promissory note against the sum due from him in respect of his call, and that to the extent of the amount so set off the mortgage was satisfied for the benefit of the company. The deposit would be returned, and the costs of both parties be paid out of the estate.

22 MARCH, 1865.

THE LORD CHANCELLOR said he had examined the papers, and adhered to the opinion he had already expressed. The order would be made in the terms he had mentioned.

Lord Chancellor. } *Ex parte SMYTHE*
18, 22 MARCH, 1865. } *Re TEAR.*

Bankruptcy—Costs of Prosecution Sanctioned by the Commissioner—24 & 25 Vict. c. 134, s. 223.

Under section 223 of *Bankruptcy Act*, 1861, the costs of a prosecution sanctioned by the Commissioner were allowed to the assignees out of the Chief Registrar's Account.

This was an application by the assignees of the bankrupt for payment out of the "Chief Registrar's Account" of part of the costs incurred by the assignees in the prosecution of the bankrupt for offences falling within section 221 of the *Bankruptcy Act*, 1861.

The prosecution was instituted with the sanction, though not by the direction, of Mr. Commissioner Holroyd. The bankrupt was tried before the Common Serjeant, and convicted: and the Judge certified that

it was a proper case for costs being allowed to the prosecutor. The usual allowance was accordingly made to the prosecutor by the county authorities, but did not nearly cover the expenditure. The assignee applied to the Commissioner for payment of the rest of the costs out of the "Chief Registrar's Account," under section 223 of the Act of 1861. The Commissioner held that he had no jurisdiction to make the order; and the assignees now appealed. It appeared that the taxed costs amounted to 840*l.*, of which 500*l.* represented actual expenditure.

THE LORD CHANCELLOR said, that he granted the application with much regret that it should cost so much to punish what might be termed an ordinary crime. It appeared, however, that 500*l.* had actually been expended, and where the outlay was so great, 340*l.* was not above the usual rate of remuneration for time and trouble. There would be no costs of this application.

Lords Justices. } MAKEPEACE v. ROGERS.
25 MARCH, 1865. }

Demurrer—Landowner and Agent—Fiduciary Relation—Charge of Documents—17 & 18 Vict. c. 125, s. 50.

In the absence of special circumstances, such as an account settled, or a release given, a landowner can sustain a bill for an account against his agent, on the ground of the fiduciary relation between them, without alleging fraud or misrepresentation.

In such a case it is immaterial that there is no reciprocity of receipts and payments.

Observations on Phillips v. Phillips (9 Hare, 471).

The 50th section of the Common Law Procedure Act, 1854, under which the production of documents can be enforced by summons, does not affect the jurisdiction of Courts of Equity.

This was an appeal against a decision of Stuart, V.-C., overruling a demurrer to a bill filed by a landowner against his agent for an account.

The bill stated that the defendant had been appointed agent and manager of the plaintiff's estates, with authority to receive rents, &c., and had been left almost uncontrolled in the management, and had also had the entire conduct of certain sales of timber, and of portions of the estates. The bill admitted that the defendant had furnished accounts, but alleged that they were meagre and unsatisfactory, and that the defendant had not produced the vouchers for certain alleged payments, or given satisfactory explanations regarding them. The bill also stated specific items in the accounts, with respect to which explanations had been demanded and withheld, and charged that the defendant had in his possession documents and muniments of title belonging to the plaintiff which he ought to deliver up.

The bill prayed for an account, and the delivery of the documents. There was no charge of fraud; see 5 N. R. 399.

Malins, Q.C., and Boyle, in support of the demurrer.

1st. In the present case the receipts and payments were by the defendant only, but a bill for an account would not lie, unless the accounts were mutual,

Phillips v. Phillips, 9 Hare, 471;

Dinwiddie v. Baillie, 6 Ves. 136, 141.

It was not even sufficient that there should be entries on each side of the account, or great complication in the accounts,

Padwick v. Hurst, 18 Beav. 575;

Padwick v. Stanley, 9 Hare, 627.

The cases of

Mackenzie v. Johnston, 4 Madd. 373,

Shepard v. Brown, 4 Giff. 208,

were virtually overruled by

Smith v. Leveau, 3 N. R. 18,

Flockton v. Peake, 3 N. R. 453, 626.

2nd. The ground of the Court's interference was the trust between the parties,

Foley v. Hill, 2 H. of L. Ca. 28;

Hemings v. Pugh, 4 Giff. 456.

The relation of principal and agent was not alone sufficient,

King v. Rossett, 2 Y. & J. 33.

The case of

Smith v. Leveau (loc. cit.),

established the principle that, whatever the nature of the agent's employment might be, if the accounts were all on one side, the bill could not be sustained.

3rd. It followed that a landowner could not sustain a bill against his agent without alleging misrepresentation or fraud, and his remedy was at Law,

Topham v. Braddick, 1 Taunt. 572.

There was no case in the books in which the simple relation of landowner and agent had been held sufficient to sustain the bill.

The Vice-Chancellor had rested his decision on the cases of,

Lord Hardwicke v. Vernon, 14 Ves. 504;

Lord Salisbury v. Ocul, 1 Cox, 277;

Lord Chedworth v. Edwards, 8 Ves. 46.

But in those cases there was either a charge or admission of fraud, and in

Lady Ormond v. Hutchinson, 16 Ves. 94,

the inquiries were directed on admissions in the answer. The same principle had been followed in,

Navulshaw v. Brownrigg, 1 Sim. (N. s.) 573;

Barry v. Stevens, 31 Beav. 258;

Fluker v. Taylor, 3 Drew. 183;

Wilson v. Short, 6 Hare, 366.

4th. The bill was simply a bill for the production of documents. That object could be obtained by summons under the Common Law Procedure Act, 1854.

Osborne, Q.C., and *F. Kelly*, for the plaintiff, were not called upon.

Knight Bruce, L.J., said: The allegation that the defendant was the agent and manager of the plaintiff's estates, and the corresponding prayer for an account, were alone sufficient to sustain this bill. *Phillips v. Phillips* (*loc. cit.*) did not mean that a reciprocity of receipts and payments was always necessary to sustain a bill for an account: the jurisdiction of the Court might arise, as in the present case, from the fiduciary nature of the relation between the parties, and there was no occasion for alleging fraud or anything else specially. If, indeed, an account had been stated and settled, or a release given, it might have been necessary to state a case to reopen the account or set aside the release, but in the present case enough had been stated to entitle the plaintiff to relief.

But the plaintiff, having stated the position of the defendant as his steward, charged him with the possession of documents which he ought to deliver up, and prayed for relief accordingly. That also was sufficient to entitle the plaintiff to a decree. His Lordship disapproved of the demurrer and of the appeal.

Turner, L.J., said: The present case was not one in which their Lordships, in justice to the Vice-Chancellor, to themselves, or to the rules of the Court, could call upon the plaintiff's counsel. The part of the bill, which referred to the documents, was alone sufficient to sustain it. It had been said that a summons under the Common Law Procedure Act would reach the documents; but he had yet to learn that that Act affected the jurisdiction of the Court of Chancery to enforce discovery. He declined, however, to decide the case on that ground, though that was alone sufficient. He had never heard that a bill for an account could not be maintained by a principal against an agent as such, although in a simple transaction the case might be more conveniently dealt with at law. It had been said, that there was no case in the books of a bill by a principal against an agent, except where fraud had been alleged. He thought that the books had not been well looked into on that subject, but if it were so, such a bill was like a bill by a *cestui-que-trust* against a trustee without special circumstances. In *Phillips v. Phillips* (*loc. cit.*), he had referred to *Mackenzie v. Johnston* (*loc. cit.*), where it was said, "The defendants were agents for the sale of the property of the plaintiff, and wherever such a relation exists, a bill will lie for an account." In *Phillips v. Phillips*, the bill alleged not an agency transaction, but a current account, between the plaintiff and the defendant and his partner; the case went on a current account between the parties. It was true that there was one single item of agency, but the case had no reference at all to the case of general account between principal and agent. Moreover, *Padwick v. Stanley* (*loc. cit.*), was calculated to set

right any doubt which might have arisen as to *Phillips v. Phillips*. The present case was clear, and the appeal would be dismissed with costs.

Lords Justices. } BEST v. STONEHEWEL
22, 28 MARCH, 1865. }

Will, Construction—Class.

A will contained a gift of real estate to such persons or person as at a specified time should be "the nearest in blood to me as descendants from my great-grandfather," J. S., "and whose kindred with me originates from him."—

Held, in the absence of any descendants from J. S., that the meaning must include two classes of persons, viz., those who were descendants of J. S., and those who were collaterally related to the testator through J. S.

This was an appeal from a decision of the Master of the Rolls, reported 5 N. R. 68, *ante*, where the will and the facts are fully set out.

Selwyn, Q.C., and *O. Hall*, for the plaintiff, the appellant.

Southgate, Q.C., and *Prendergast*, for the defendants, the respondents.

The arguments of counsel were similar to those used in the Court below. The following additional authorities were referred to as illustrating the meaning to be attached to the word "descendants,"

Williams v. Williams, 1 Sim. (N. S.) 358, 371;

Earl of Tyrone v. Marquis of Waterford, 1 De G. F. & J. 627;

Robinson v. Shepherd, 10 Jur. (N. S.) 53.

TURNER, L.J., said: The words "descendants from my great-grandfather," "and whose kindred with me originates from him," seemed to denote a class or classes of devisees, the words "nearest in blood to me" pointing out what members of such class or classes were to take. In this point of view the question arose, whether the former words denoted only one class or two classes, and his Lordship thought that the latter construction must prevail.

It had been strongly urged by the plaintiff that the words "and whose kindred," &c., were merely another description of the same persons as were "descendants from my great-grandfather;" but he could not assent to that argument, inasmuch as it was the proper rule of construction to give some meaning to all the parts of a will, if possible, and he thought that those words were intended to denote persons collaterally related to the testator, their kindred with him originating with his great-grandfather. The knowledge of the testator of the non-existence of any descendants from his great-grandfather much strengthened this opinion.

His Lordship's judgment substantially agreed in its effect with the decree of the Master of the Rolls, but he thought the form of the decree unsatisfactory,—

as there ought to be an inquiry in accordance with the will as now construed.

KNIGHT-BRUCE, L.J., said, that as his learned Brother substantially agreed with the judgment of the Master of the Rolls, it was not necessary for him to express an opinion; but he was not able to read the will so as to construe the word "descendants" as the Master of the Rolls had done.]

Minute.—Declare that plaintiff is a trustee for such persons or person as at the time of the death of the testator's widow were or was nearest in blood to the testator, of a class composed of the descendants of the testator's great-grandfather, J. Stonehewer, and of the persons whose kindred with the testator originated from their being related to his said great-grandfather. Costs of all parties to be paid out of the estate.

Master of the Rolls. } MORTIMER v. BELL.
23, 27 MARCH, 1865.

Auction—Puffing—Specific Performance.

Puffing does not invalidate a sale, if the puffer does not bid beyond a fixed reserved price:

But the sale is bad, if the puffer is employed for the purpose of running up the purchaser, and not solely to prevent a sale below the reserved price.

An auctioneer and puffer bid against one another for eleven bids, the purchaser then bid, and the property was knocked down to him at less than the reserved price, without any other bona fide bid having been made:—

Held, that the sale was good, and that the contract must be enforced.

This was a motion for decree in a suit for specific performance.

The plaintiffs, who were devisees in trust for sale of a freehold house with grounds to the extent of four acres, at Tooting in Surrey, caused the property to be put up for auction in August, 1864. The defendant having purchased it for 3,650*l.*, paid 365*l.* as a deposit, and signed a memorandum agreeing to purchase the property, and to take the particulars and conditions of sale as the terms of the agreement.

Neither the particulars, nor the conditions of sale, nor the auctioneer at the auction, reserved power to the vendors to bid, or stated that there would be a reserved price, nor did they state the sale to be without reserve, but the first condition of sale was—"The highest bidder shall be the purchaser; and if any dispute shall arise as to the last or best bidding, the lot in dispute shall be put up again and resold."

The defendant, as one of his requisitions on the title, inquired whether "the vendors' solicitors or auctioneers, or the vendors themselves, or any of them were aware of any bidding having been in fact made at the auction by or on behalf of the devisees,

or any of the family of" the testator? Not being satisfied with the answers returned to this and subsequent inquiry on the same point, he declined to complete without being satisfied that there had been no puffing, and the only question now raised was, whether there had been such puffing as to disentitle the plaintiff to have specific performance decreed.

After the bill was filed, the defendant had brought an action for his deposit, but had been restrained from proceeding in it by an injunction granted in the present suit.

The evidence in the suit was, that the auctioneer was instructed not to sell the property under 4,000*l.* The only bidders were the auctioneer and his agent, who made eleven bids against one another, rising from 2,500*l.* to 3,600*l.* The defendant then bid 3,650*l.*, and immediately one of the plaintiffs told the auctioneer to sell; whereupon the auctioneer declared it was an open sale, and knocked down the property to the defendant.

The property, which was advertised as "available for building purposes," adjoined the defendant's house and grounds, and if covered with small houses would be injurious to his property. The defendant, judging from two other purchases of adjoining land recently made by him, estimated the value of this property at 2,600*l.*, but, believing that the bids were *bona fide*, and fearing, therefore, that it was being bought for building purposes, was induced to make the bid of 3,650*l.* The plaintiffs did not contradict the defendant's estimate of the value, nor except by their answers to the requisitions, deny the puffing.

Baggallay, Q.C., and Steere, for the plaintiffs.

When a sale is not stated to be without reserve, a reserve bidding is implied. That was the case here, only at a certain point the reserve was abandoned, and the public were told it was an open sale.

At Law no puffing is allowed, but in Equity a bidder may be employed by the vendor to prevent the property being sold below a certain reserved price, though not to enhance the price beyond that,

Sug. V. & P. 9 (14th ed.);

Bramley v. All, 3 Ves. 620;

Conolly v. Parsons, 3 Ves. 625, n. 64;

Smith v. Clarke, 12 Ves. 477.

The plaintiffs were trustees, and bound to sell with a reserved price.

Hobhouse, Q.C., and Busk, for the defendant.

It was not stated that there was a reserved price, or that the vendors would bid. The cases at Law show that the condition, "the highest bidder is to be the purchaser," means the highest *bona fide* bidder, and that this is a contract of the vendor with the public, and if he employs a bidder, so that the public believe that others are bidding, he commits a fraud on the purchaser, and the contract is bad,

Barnes v. Christie, Cowp. 395;

Howard v. Castle, 6 T. R. 642;

Crowder v. Austin, 3 Bing. 368; 11 J. B. Moo. 283;

Thornett v. Haines, 15 M. & W. 367, 372;

Green v. Baverstock, 14 C. B. (N. s.) 204; 2 N. R. 128;

At Law, therefore, the employment of a puffer is evidence of fraud.

In the cases cited by the plaintiff, specific performance was granted, because there were real bidders, or no averment to the contrary, but the remarks of the Judges are in our favour, and show that Equity does not allow the vendors to give a fictitious appearance of competition. And so also in

Flint v. Woodin, 9 Hare, 618,

Woodward v. Miller, 2 Coll. 279.

In the latter case the defendant declined to try the legal question, and in both the two last cases there was no evidence of over-value. In

Robinson v. Wall, 2 Phill. 372, specific performance was refused.

Where the contract is bad at Law, as it clearly is here, specific performance will not be decreed,

Woodward v. Miller, 2 Coll. 279, 283,

which is not contravened by any other case. In no case has the contract been enforced where there were no real bidders, and the competition was merely apparent, nor where the over-value paid by the purchaser has been very great, nor where more than one bidder has been employed, all which elements are to be found in this case. On the last point,

Sug. V. & P. 10 (14th ed.). is conclusive.

Baggallay, Q. C., in reply.

In *Thornett v. Haines* (*loc. cit.*), the sale was "without reserve." The other cases at Law were actions against the auctioneer for the deposit (except *Howard v. Castle* (*loc. cit.*), and *Crowder v. Austin* (*loc. cit.*), where the purchaser was clearly bid up), and differ, therefore, from this case, which is between the vendor and purchaser.

The alleged rule extracted from *Woodward v. Miller* (*loc. cit.*), was a mere dictum of Knight Bruce, V.-C., and contrary to his decision in the case, which was in our favour.

The fact of the sale being, as in this instance advertised, by executors implied a reserve bid.

27 MARCH, 1865.

THE MASTER OF THE ROLLS said: According to the evidence, when the sale took place the vendors determined that the property should not be sold below a certain price, which was fixed ultimately at 3,600*l.*, and so instructed the auctioneer. The auctioneer employed one person to bid, and then himself bid against that person up to 3,600*l.*, and then both stopped; the defendant bid 50*l.* more, no other bidding was made, and the property was knocked down to the defendant. This, in his Honour's opinion, was the clear result of the evidence.

It was totally impossible to reconcile the cases at Law and Equity. He must, therefore, consider the principle on which the cases had been determined in Equity. It was clear that any puffing made the contract bad at Law, but it was not so in Equity. It was a principle of human nature that made a man, when engaged in an auction, get stimulated by other persons bidding against him, and, being unwilling to be beaten, bid more than he would do on calm reflection. Courts of Equity considered that it was a species of fraud to take advantage of this principle of human nature, and that a sale was bad when such a thing was done. But they had decided that the vendor might fix a reserve bidding and employ a person to bid up to that amount. Even that, however, was not allowable when the particulars or conditions of sale announced the property to be sold "unreservedly," for that meant, that it would be sold without any distinction or reserve for the best *bond fide* price bid for it. If the sale was not expressed to be "unreservedly," a reservation was implied, either a reserve bidding to be made by the vendor, or a reserved price, beneath which the property would not be sold.

The result of the cases was, that if there was a certain fixed reserved price which the vendor assumed to be the value of the property, and the object of the bidding by his agent was, not to run up the purchaser by the animation of a contest, but merely to prevent a sale below that reserved price,—then it was a fair and legitimate proceeding; but if the bidding by the vendor went beyond this, it was not so. The present case, in his Honour's opinion, did not go beyond that. Biddings went on between the puffer and the auctioneer up to the reserved price, the defendant only added one bidding, and was not urged on by any person bidding beyond that. His Honour, therefore, considered it was a good and *bond fide* sale.

Minute.—Decree specific performance of the contract, subject to the usual reference as to title. The defendant to pay the costs up to the hearing.

Master of the Rolls. } *Re* PHILBRICK'S SETTLEMENT.
27 MARCH, 1865. }

Appointment—Trustees—Executors—23 & 24
Vict. c. 15, s. 4.

Where a married woman who was the donee of a general power of appointment executed it by will, and appointed as executors persons who were neither appointees, nor the trustees of the settlement:—

Held, that it was the duty of the executors, and not of the trustees of the deed conferring the power, to distribute the property appointed among the appointees.

Quære, whether this would be so in the case of any donees of a power.

Platt v. Routh (6 M. & W. 756), observed upon.

A married woman had, under the settlement, a general power of appointment by will over the funds

subject to the settlement. She executed this power by a will, by which also she appointed executors. She died in her husband's life-time, and her executors obtained letters of administration with the will annexed. Her husband had an interest in the funds under his wife's appointment, and had given notice to the trustees of the settlement not to pay the money to his wife's administrators. The money had been paid into Court, and the administrators now petitioned for the payment of it out to them.

Baggallay, Q. C., and Hardy, for the petitioners.

C. Hall, for the trustees of the settlement, submitted that it was the duty of the trustees, and not of the administrators, to administer this money. It was not formerly liable to probate duty,

Platt v. Routh, 6 M. & W. 756, 791, 10 Cl. & Fin. 257,

because it was not part of the property of the appointor, which executors had to administer. The rule as to the duty was altered by 23 & 24 Vict. c. 15, s. 4, but section 5 shows that the trustees are the persons to administer the property subject to such a power.

The fund was no doubt liable to the appointor's debts, which were ordinarily paid by executors, but that was a very peculiar equity, and a purchaser from an appointee, without notice, had priority over the appointor's creditors.

THE MASTER OF THE ROLLS, without calling for a reply, said: In his opinion the donee of a general power of appointment could appoint to strangers as trustees, and as there could not be two sets of trustees, the second would be entitled to have the fund paid to them upon the trusts declared by the appointment. It was true that if the donee of the power appointed the fund in certain proportions among various persons, then the original trustees were trustees to see that this appointment was carried into execution.

Now where a married woman appointed a fund to certain persons, and appointed executors, she imposed on those executors the burden of the execution of the trusts, as if she had appointed to them as trustees. She could only appoint executors as a donee of the power, and executors so appointed were executors solely to administer the fund subject to the power, and there could be no other fund for them to administer; she therefore made them trustees of that fund.

The passages cited from Lord Abinger's judgment in *Platt v. Routh* (*loc. cit.*), meant that whether there had, or had not been, an appointment in execution of the power, the ordinary could not have touched the fund, for it belonged, if it was not appointed, to the trustees,—if it was appointed, to the appointees. And similarly, executors could not touch the fund, unless the will which made them executors also executed the power. Where it was said, "that neither the ordinary nor the executor ever could have

administered any part of this property," it was meant that the executor, *but for the will*, could not have administered. But by the appointment the execution of the trusts was remitted to the particular persons named as trustees in the will, that is the executors. The statute which had been referred to, in his Honour's opinion, confirmed this view of the case, because it made the executors liable to pay the duty. The money must, therefore, be paid to the executors.

Kindersley, V.-C. } **HUTTON v. SCARBOROUGH**
23 MARCH, 1865. } **CLIFF HOTEL COMPANY**
 } **(Limited).**

Company—Issue of Shares with a Preferential Dividend—Acts ultra vires—Breach of Contract with Shareholders—25 & 26 Vict. c. 89, ss. 12, 50.

It was provided by the articles of association of a joint-stock company that "the directors might declare a dividend, to be paid to the shareholders in proportion to their shares." At two general meetings of the company, resolutions were passed, giving the directors power to issue the shares remaining unallotted with a preferential dividend:—

Held, that these resolutions were a breach of the contract into which all the shareholders in the company had entered with one another.

This was a motion for an injunction, under the following circumstances—

In the month of June, 1862, the Scarborough Hotel Company (Limited) was established, according to the provisions of the Joint-Stock Companies Act then in force.

The memorandum of association was as follows:

1st. The name of the company is the Scarborough Cliff Hotel Company (Limited).

2nd. The registered office of the company is to be established in England.

3rd. The objects for which the company is established are, the purchase of lands and tenements in Scarborough, the erection, furnishing, and maintenance of an hotel and club thereon, the carrying on the usual business of an hotel and tavern therein, the erection of other buildings, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects.

4th. The liability of the shareholders is limited.

5th. The nominal capital of the company is 120,000*l.*, divided into 12,000 shares of 10*l.* each.

The 72nd of the articles of association was—

"That the directors might, with the sanction of the company, in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares."

On the 25th of January, 1865, the following circular was sent to the shareholders in the company :

"The Scarborough Cliff Hotel Company, Limited.

"Registered Office,

"74, Newborough Street, Scarborough.

"Notice is hereby given, that an extraordinary general meeting of shareholders of the Scarborough Cliff Hotel Company, Limited, will be held at the Royal Station Hotel, in the City of York, on Monday the 6th of February, 1865, at five o'clock in the afternoon precisely, when the following resolutions will be proposed as a special resolution pursuant to the Companies Act, 1862, viz., 'That as to 5,783 shares, and all other shares from time to time remaining unallotted, or any of them, the directors may if they think fit, and at such time or times as they may deem expedient, issue the same with a preferential dividend, not exceeding the rate of 7½ per centum, per annum, payable from time to time, half-yearly, out of the net revenue of the company, for each separate year, but without recourse to the revenue of any subsequent year; and the directors may pay such preferential dividend accordingly, and also make calls in respect of such shares in such amounts at such time or times and in such manner as they may think fit; and such shares shall be subject to the articles of association, and the regulations of the company, except so far as the same may be inconsistent with this resolution.'

"And such resolutions will be passed, and such proceedings adopted with reference thereto, as shall be determined.

"Dated this 24th day of January, 1865.

"By order,

"T. W. D. L. FERNANDES,

"Secretary."

These resolutions were accordingly passed at an extraordinary general meeting of the 6th of February, and confirmed at another extraordinary general meeting on the 2nd of March.

The plaintiffs were three shareholders of the company. Their bill prayed that it might be declared that it was beyond the powers of the extraordinary general meetings of the shareholders of the company, held on the 6th of February, and the 2nd of March, 1865, respectively, to pass the above resolutions, so as to bind the plaintiffs and the other dissentient shareholders: and for an injunction.

The defendants were the directors of the company.

Baily, Q. C., and Speed, for the plaintiffs.

The resolutions are *ultra vires*. All shares in the company must be of one kind; this is shown by the language of the 72nd article of association, which provides that "a dividend is to be declared in proportion to the shares." They relied on,

Moss v. Syers, 32 L. J. (N. S.) 711, and on the 12th section of the Companies Act, 1862.

Glasser, Q. C., and Berry, for the defendants referred to,

Piddell v. Lancashire and Yorkshire Railway Company, 2 De G. & Sm. 531;

Edwards v. Shrewsbury and Birmingham Railway Company, 2 De G. & Sm. 537.

The question turns on the 50th section of the Companies Act, 1862, not on the 12th. We intend to alter the articles of association, not the memorandum.

The plaintiffs ought to have attended these meetings, and opposed the resolutions there,

Poss v. Harbottle, 2 Hare, 461, 464;

Mosley v. Aiston, 1 Ph. 790;

Lord v. Governor and Company of Copper Miners, 2 Ph. 740.

Even could they have come to move for an injunction before the resolutions were confirmed, they can, not come now after their confirmation.

The resolutions are not *ultra vires*; the third paragraph of the memorandum shows the objects of the company,

Simpson v. Westminster Palace Hotel Company, 8 H. of L. Ca. 912;

Dryon v. Metropolitan Saloon Omnibus Company, 3 De G. & J. 123;

Yates v. Norfolk Railway Company, 3 De G. & S. 293;

Macdougall v. Jersey Imperial Hotel Company, 4 N. R. 497.

They also cited,

Australian Auxiliary Steam Clipper Company v. Monney, 6 W. R. 734.

KINDERLEY, V.-C., said: By the 72nd article of association, when a dividend was paid to the shareholders, it was to be paid to them in proportion to their shares. When any person took shares in this company, he entered into a contract with all the other shareholders, that they should all receive a rateable dividend in proportion to their shares. The question was, could a majority of shareholders say, that they would give certain persons a preferential dividend, if they would take shares in the company; so that the dividends on the shares of former takers of shares should be suspended until these preferential dividends were paid? This was a clear breach of the contract with such former takers of shares. It was said that there was a power to vary the articles of association. Even if there was such a power, it must be exercised at a general meeting convened expressly for that purpose.

He should, therefore, grant an injunction against the defendants, from issuing any of the unissued shares of the company with a preferential dividend.

Wood, V.-C. } THE SINGER MANUFACTURING
23 MARCH, 1865. } COMPANY v. WILSON (2).

Practice—Patent—Inspection.

When the defendant deals in machines which are, as is alleged by the plaintiff, an infringement of his patent, the defendant will not be ordered, in a suit in respect of such infringement, to allow the plaintiff to inspect all the machines in his stock; but he will be directed to verify on affidavit the several kinds of machines that he has sold or exposed for sale, and to produce one machine of each class for inspection.

This was a suit in respect of alleged infringements by the defendant of the plaintiffs' patent for sewing machines.

The prayer of the bill was for the usual injunction and account; and "that the defendant may be ordered to permit inspection by the plaintiffs, or their agents, or witnesses, at such time as this Court shall direct, of all the sewing machines of every kind now on his premises, and to take photographs or drawings thereof, and that he may be ordered not to remove any of such machines from his premises until such inspection shall have taken place."

Giffard, Q.C., and Drewry, for the plaintiffs, moved for an order for inspection following the terms of the prayer of the bill.

Lawson (Sir H. Cairns, Q.C., with him), for the defendant.

This is an application for liberty to inspect the entire stock of the defendant, which might be most injurious to him, as the plaintiffs are rival traders.

Inspection is only ordered in cases where some process of manufacture is being carried on, which is alleged to be an infringement of the plaintiff's patent.

The only case in which inspection of the manufactured article has been ordered is—

Patent Type Founding Company v. Waller, John.
727.

Wood, V.-C., here intimated that he should not grant the extended form of inspection asked for.

Giffard, Q.C., and Drewry, then limited their demand to an inspection of one machine of each class sold or exposed for sale by the defendant.

Lawson, contended that the inspection asked for was too wide. The Court could not grant more even after a decree in favour of the plaintiff;

The Leather Cloth Company (Limited) v. Hirschfeld, 1 H. & M. 295.

Wood, V.-C., granted the inspection in the form to which the plaintiffs' counsel had limited their demand.

Minute.—Defendant to verify on affidavit the several kinds of machines which he has sold or exposed for sale since the date of the last disclaimer, one of each class of machines to be produced at his solicitor's office for inspection, at reasonable times, by the plaintiffs'

solicitors, by Messrs. A. and B. (two of the plaintiffs' scientific witnesses), and by the plaintiffs.

Wood, V.-C. } STEPNEY v. BID-
8, 13, 14, 15, 27 MARCH, 1865. } DULPH.

Parliamentary Power—Illegal Exercise—Sale Set Aside—Allowance for Improvements—Interest.

Under powers contained in an Act of Parliament a railway company bought part of a settled estate from the tenant for life, and immediately resold to B and C, who expended large sums in permanent improvements. On the sale being set aside at the instance of the remaindermen, B and C were allowed such sums as they had expended in improvements.

Interest at 5l. per cent. allowed on such sums from the death of the tenant for life.

By an Act of Parliament passed in the year 1828, the Llanelly Railway Company were empowered to purchase any parcels of land (not exceeding in the whole twenty acres) for the purpose of erecting thereon warehouses or wharves, or for any other purposes connected with the railway and dock thereby authorised to be made which the company should judge requisite and necessary; and tenants for life, and other incapacitated persons were empowered to sell any parcels of land to the company for such purposes.

In 1839, William Chambers, the elder, was tenant for life of certain estates devised by the will of Sir John Stepney; and the company purchased of him, under the above-mentioned power, portions of these estates. Before the company had entered into a binding contract with William Chambers, the elder, for the sale of the lands to them, they had agreed to sell to the defendants, Biddulph and William Chambers, the younger, part of the land for the purchase of which they were in treaty; and it appeared that the company's intention to re-sell the land, was known to William Chambers, the elder.

In pursuance of this agreement, parts of the land were conveyed by the company to Biddulph and William Chambers, the younger, who expended considerable sums in permanent improvements thereof.

A bill was filed by the present tenant for life, and the remaindermen, under Sir John Stepney's will, for the purpose of having the sales to Biddulph and William Chambers, the younger, set aside, as having been made in pursuance of a fraudulent scheme, the object of which was to enable Biddulph and William Chambers, the younger, to secure for themselves portions of the Stepney Estates.

THE VICE-CHANCELLOR held, that the alleged fraudulent scheme was not proved, but that the sale was *ultra vires*, and must be set aside. The question then arose, whether the defendants were entitled to any allowance for the sums expended by them on improvements.

Sir H. Cairns, Q.C., Osborne, Q.C., and C. C. Berkeley, for the plaintiffs, contended that the transaction being a fraudulent one, no allowance ought to be made for improvements,

Kenny v. Browne, 3 Ridg. P. C. 518.

At all events the defendants stood in no better position than the tenant for life, and therefore could only be allowed such expenditure for improvements (if any) as he would have been allowed. To make any further allowance would be to improve the remainderman out of his estate,

Caldecott v. Brown, 2 Hare, 144 ;

Master and Fellows of Clare Hall v. Harding, 6 Hare, 273 ;

Sugden's V. & P. 747 (14th ed.).

The Attorney-General, Giffard, Q.C., and C. T. Simpson, for Biddulph.

W. M. James, Q.C., Bagshawe, and Stirling, for W. Chambers.

The principle on which allowance is made for improvements is that he who comes into equity must do equity,

Sturgis v. Champneys, 5 M. & Cr. 105.

Such allowance is made even in cases of gross fraud,

Charter v. Trevelyan, 11 Cl. & Fin. 714 ;

Trevelyan v. White, 1 Beav. 588 ;

a fortiori, where all that can be said against the transaction is, that a power has been used in an illegal manner.

The allowance must be made for the whole value of the improvements, not merely for such improvements as the tenant for life could have made,

Ward v. Hartpole, 3 Bligh, (N. S.) 470.

27 MARCH, 1865.

WOOD, V.-C., said, that the defendants were entitled to be allowed the value of the permanent improvements made by them. It was not the case of sums being expended with the view of rendering it impossible for the remainderman to recover his estate, and so improving him out of his estate, as it was called ; on the contrary, the sums were *bond fide* expended for improvements, and had actually increased the value of the estate. Neither was the case the same as that of a tenant for life, for the defendants had here got possession of the fee, though in an irregular manner. There would be an inquiry as to the sums expended by the defendants respectively for permanent improvements, and interest would be allowed on such sums at 5l. per cent. from the time when the present tenant for life came into possession of the estate.

Wood, V.-C. } SOUTH v. BLOXAM.
24, 27 MARCH, 1865. }

Surety—Costs of Action—Second Mortgagee.

The executor of a person, who had joined as surety in a mortgage, unsuccessfully defended an action on the

covenant in the mortgage, and was compelled to pay the debt :—

Held, that, as against a second mortgagee, he could not tack the costs of such defence to the first mortgage.

By an indenture of mortgage, dated the 14th of January, 1851, Susannah Arnold and Henry Arnold, to secure an advance to Henry Arnold of 2,800l., demised certain real estates, to which they were successively entitled for life, to Emily and Louisa Marcon, for a term of ninety-nine years, if they or either of them should so long live, and Henry Arnold at the same time assigned to the Marcons two policies of assurance on his own life, and certain books and paintings, and also plate and furniture and other personal effects.

Susannah Arnold joined in this mortgage only as surety for Henry Arnold.

Susannah Arnold died soon after, on the 26th of April, 1851, and the defendant Bloxam was her executor.

In May, 1851, there was a further charge of 600l. advanced by the Marcons. This latter charge was subsequently satisfied.

On the 25th of March, 1852, Henry Arnold, in consideration of 2,400l., executed a second mortgage to the plaintiffs of the same property, with the exception of the policies of assurance, as was comprised in the mortgage of the 14th of January, 1851, and also assigned to them two other policies of assurance on his life, which were subsequently allowed to drop.

On the 7th of March, 1853, the Marcons commenced an action against Mr. Bloxam as executor of Susannah Arnold upon the covenant in the mortgage, but, before any further steps were taken, sold the books and paintings, and subsequently the plate and furniture. The net proceeds of the two sales, (after a sum of money had been appropriated in payment for the plate and furniture, which had been bought but not paid for by Henry Arnold) not being sufficient to discharge the mortgage debt to the Marcons, the action was continued.

The history of the action, *Marcon v. Bloxam*, will be found reported 25 L. J. (Ex.) 193. The result was in favour of the Marcons, except as to an item of 632l., the further charge which the Marcons claimed to tack to their mortgage, which was disallowed.

By an indenture, dated the 24th of April, 1856, which recited the original mortgage, and that the defendant had paid to the Marcons 484l. 14s. 11d., the amount for which the verdict was directed to be entered, and also 429l. 10s. 6d., the costs of the action, and also the further sum of 102l. 7s. 4d., by the award directed to be paid, and a further sum of 1l. 17s. 7d., for interest, from the day appointed for payment, making the total sum of 1,018l. 10s. 4d., Emily and Louisa

Marcon transferred the two policies forming part of their security to the defendant.

Henry Arnold died on the 28th of September, 1858, having been for some time insolvent, and Mr. Bloxam shortly afterwards received the sum of 2,800*l.* the amount receivable under the two policies. The plaintiffs asserted that the defendant Bloxam was well aware of the existence of their security at the time he defended the action if not before, that he never gave notice to the plaintiffs of the proceedings in the action, or of the assignment to him of the policies, that, after various applications, he admitted a balance in his hands of 690*l.* 3*s.*, but that the accounts were incorrect, and that he had deducted from the moneys received by him the costs incurred in the action at law, which he had no right to do.

They offered, however, to waive any further question as to the account, if the defendant would consent to strike out an item of 658*l.* 4*s.*, for the costs of the defences to the action, and would also pay interest from the date when the policy fund was received, and strike out the interest which had been claimed on the sum of 658*l.* 4*s.*

The defendant refused to submit to these terms, and the plaintiffs now prayed for a declaration that they were entitled to have the balance of the moneys received by the defendant out of the property comprised in the indenture of the 14th of January, 1851, after satisfying what was due upon such security, applied in satisfaction of the moneys due upon the plaintiffs' security, and for accounts and payment by the defendant of what should be found due.

Paragraph 18 of the bill stated, "That there never was any real defence to the said action, except as to the sum of 638*l.* 5*s.* 6*d.*, and the other defences raised by the defendant ought not to have been taken, or if taken, the costs occasioned thereby could not have been properly charged against Henry Arnold (to whom no notice of the proceedings in the action was given) as costs which his surety had been compelled by his default to incur, and none of the costs of the said action, even if the same had been properly chargeable against the said Henry Arnold, could have been properly charged against the present plaintiffs, who were also wholly ignorant and without notice of the proceedings in the said action."

Mr. Bloxam, by his answer, denied that he was aware, before October or November, 1863, that the plaintiffs' mortgage included the same property as was comprised in the mortgage of the 14th of January, 1851; and on this point the evidence was conflicting. He admitted that he had not given the plaintiffs any notice of the action, or of his intention to defend it; but contended that he was justified in defending it, and did so in consequence of counsel's opinion that he had a good defence.

Giffard, Q. C., and *Hemming*, for the plaintiffs, contended, that the defendant, as surety, could not place

himself in a better position than the first mortgagees; that the cost of defending the action could not be considered as first mortgagee's costs; it was, at the utmost, nothing more than a simple contract debt from Henry Arnold, and could not be tacked to the mortgage.

They cited,

Copis v. Middleton, 1 T. & R. 231;

Newton v. Chorilton, 2 Drew. 333;

Hodgson v. Shaw, 3 My. & K. 190,

On the question of mortgagee's costs,

Lewis v. John, 9 Sim. 366.

Roll, Q. C., and *Bevir*, for the defendant, contended that Mr. Bloxam was justified in defending the action, and had a right to be recouped all his expenses.

This case was different from *Copis v. Middleton*, as the security still existed, and that allowed the equities to come in. The case was perfect against the mortgagor, and a second mortgagee must take subject to all the equities created by the first mortgagee, especially where, as here, there was no knowledge, as they maintained, by the surety of the second mortgage.

As to the moneys received for the policies, the plaintiffs could have no right of marshalling as against the defendant, for the policies were not the same as those comprised in the mortgage to the plaintiffs, and had been kept up at the defendant's expense.

THE VICE-CHANCELLOR only called on *Giffard, Q. C.*, for a reply, on the question, Whether the costs of the action could fairly be called mortgagee's costs?

27th MARCH, 1865.

WOOD, V.-C., having decided that the plaintiffs were clearly entitled to marshal the policies, said: The right of a surety to be indemnified only arose upon his paying the debt, or being otherwise damnified, and he apprehended that the existence of such a right did not prevent the mortgagor from dealing with the mortgaged estate in the interval. In this respect the right of a surety differed from a charge limited to arise on a particular event. In the present case the surety had unfortunately disputed his liability, and considerable costs had been incurred. It might have been necessary to take the accounts, but the surety had raised other questions, and had only succeeded in striking off the further advance. If there had been a surplus after the second mortgage had been satisfied, the mortgagor would not have been entitled to redeem the surety without paying everything, including the costs of the action. The principle of *Copis v. Middleton* (*loc. cit.*), was, that the debt of the principal to the surety was only a simple contract debt, and the surety could not, as against a second mortgagee, tack a simple contract debt to the mortgage. Therefore, as to the 658*l.* paid by the defendant as his costs of the action, he clearly could not claim any portion of these as against a second mortgagee. There was more difficulty

as to the costs of the plaintiffs in the action, and it would be proper to ascertain how far they were necessary.

His Honour then inquired, whether the present plaintiffs had not offered at the commencement of the

suit to pay the costs of the plaintiffs in the action, and on being informed that such was the case, said, he should give the defendant the costs so offered, and the plaintiffs would have the costs of the present suit.

COMMON LAW.

Q. B. { PEW and Others, Appellants.
18 JAN. 1865. { THE METROPOLITAN BOARD OF
WORKS, Respondents.

11 & 12 Vict. c. 112—18 & 19 Vict. c. 120,
ss. 170, 181 (*Metropolis Local Management
Act, 1855*)—*Sewers Rate—District—Parish
—Rateability—Annual Value—Benefit.*

*From the passing of 11 & 12 Vict. c. 112, the Metropolitan Commission of Sewers included within its limits separate sewerage districts. The S & K being one of these districts, comprised the parish of G and other parishes. The Commissioners having, before the passing of the Metropolis Local Management Act, 1855, borrowed 200,000*l.*, spent 67,000*l.* thereof upon the S & K district, whereof 519*l.* only was spent on the parish of G, and the only benefit received by that parish directly or indirectly from the 200,000*l.* was equal to 1,074*l.* 6*s.* 10*d.* The Metropolitan Board of Works, acting under sections 170 and 181 of the Metropolis Local Management Act, 1855, apportioned the 67,000*l.* among the parishes of the S & K district, according to the rateable value of the property in such parishes respectively, and not according to the proportion of the 67,000*l.* expended in, or the benefit from such expenditure derived by, such parishes respectively, and accordingly charged to the parish of G the sum of 9000*l.*, and made a rate:—*

Held, that the rate was valid, since the parish of G had received some benefit from the expenditure, and since the principle of rateability in proportion to the quantum of benefit could not be carried out without inquiring what was the amount of benefit derived by each street, and each house in the parish, and the Board were at all events not bound to make such an inquiry:

Semble, that in section 170 of the Metropolis Local Management Act, 1855, "parts," in the words "the several parts of the Metropolis," means "sewerage districts," and not parishes, streets, or houses.

The extra-judicial opinion expressed in The Metropolitan Board of Works v. The Vauxhall Bridge Company, not followed.

1st. This is an appeal against a rate made on the 3rd of May, 1861, upon the parish of St. Giles,

Camberwell, in the county of Surrey, under the Metropolis Local Management Act, 1855.

2nd. The rate was made in pursuance of and according to an assessment made by the Metropolitan Board of Works upon the vestry of the parish, and the appellants were rated in the assessment as occupiers of lands in the parish.

3rd. By consent, and by the order of Blackburn, J., pursuant to 12 & 13 Vict. c. 45, the following case is stated for the opinion of the Court:

4th. From the passing of 11 & 12 Vict. c. 112, until the expiration of that Act, the Metropolitan Commission of Sewers included within its limits separate sewerage districts or levels, some of which contained and consisted of distinct parishes, while others contained and consisted of distinct parishes and parts of parishes, and the practice of the Commissioners was to make all assessments and rates for sewerage works upon each separate district or level on the rateable value of the property therein, and not upon the individual parishes within such district or level.

5th. In 1854 the Commissioners, by virtue of 11 & 12 Vict. c. 112, and 16 & 17 Vict. 125, borrowed from the Rock Life Assurance Company the sum of 200,000*l.*, and for securing the repayment thereof assigned to the trustees of the society all the moneys arising and to arise from the several district rates in and for the whole of the separate sewerage districts within the limits of their commission.

6th. This sum of 200,000*l.* was borrowed for the purpose of the main drainage of the metropolis, but instead of applying the same to that purpose, the Commissioners expended it in the local drainage of certain parishes within the limits of their commission.

7th. The parish of Saint Giles, Camberwell, prior to and until the passing of the Metropolis Local Management Act, 1855, formed part of one of the said sewerage districts or levels within the limits of the Metropolitan Commission of Sewers called "the Surrey and Kent Sewerage District," which comprised eighteen other parishes and parts of parishes.

8th. Prior to the passing of the Metropolis Local Management Act, 1855, there had been expended by the Metropolitan Commissioners of Sewers for local drainage in the said parishes and parts of parishes

comprised in the Surrey and Kent Sewerage District, 67,000*l.*, part of the sum of 200,000*l.* Of this 67,000*l.* only 519*l.* was expended in the parish of Saint Giles, Camberwell, and the residue of the 67,000*l.* was expended in other parishes forming part of the Surrey and Kent Sewerage District, and the parish of Saint Giles, Camberwell, did not, nor will, receive any benefit from such expenditure, or from any part of the 200,000*l.* beyond the said sum of 519*l.*, except in so far as it receives benefit (as stated in the 13th paragraph of this case) from the generally improved drainage of the Surrey and Kent Sewerage District, consequent on the expenditure of the sum of 67,000*l.*

9th. The Metropolitan Board of Works did not apportion the whole of the 200,000*l.* among all the parishes within the limits of the Metropolitan Commission of Sewers, but did apportion the 67,000*l.* among the several parishes comprised in the Surrey and Kent sewerage district, according to the rateable value of the property in such parishes respectively, and not according to the proportion of such sum of 67,000*l.* expended in such parishes respectively, or to the benefit derived by such parishes respectively from such expenditure. The amount charged by such apportionment upon the parish of St. Giles's, Camberwell (including the said sum of 519*l.*), was 9000*l.* and interest thereon, to be paid by twenty yearly instalments of 790*l.*

10th. At a meeting of the Metropolitan Board of Works, held on the 3rd day of December, 1858, it was resolved that the Board should, in the then ensuing Session of Parliament, apply for statutory powers to re-apportion among the several parishes concerned the debt in respect of the 200,000*l.*, according to the actual benefit derived by each parish, from the expenditure thereof, and that it should be referred to a committee of the Board to consider and frame a proper apportionment on that basis, and that the same should be submitted for the approval of the Board.

11th. On the 1st day of July, 1859, the Board approved of and adopted the apportionment made by the committee on the basis aforesaid, and it was resolved by the Board that in the bill which was then about to be brought into Parliament by them for amending the Metropolitan Local Management Act, 1855, the 200,000*l.* should be charged on the several parishes and districts in the proportions therein mentioned, and the sum of 1,074*l.* 6*s.* 10*d.* (including the said sum of 519*l.*) was therein charged on and apportioned to the parish of St. Giles, Camberwell, as the amount chargeable thereon in respect of the benefit derived by the parish from the expenditure of the 200,000*l.*

12th. The said bill for amending the Metropolitan Local Management Act, 1855, was afterwards brought into Parliament by the Board for the purpose (among others) of charging the 200,000*l.* on the several parishes and districts in the proportions last aforesaid,

and of charging the aforesaid 1,074*l.* 6*s.* 10*d.* on the parish of St. Giles, Camberwell, and in the schedule to the bill the 1,074*l.* 6*s.* 10*d.* was inserted against the parish as the sum to be charged thereon, but the clauses in the bill for the re-apportionment of the debt never passed into law.

13th. For the purposes of this case and of the rate, the 1,074*l.* 6*s.* 10*d.* may be taken to represent the whole benefit received directly and indirectly by the parish of St. Giles, Camberwell, from the expenditure of the 200,000*l.*

14th. In consequence of the Vestry of St. Giles, Camberwell, refusing to obey the precept of the Metropolitan Board of Works, requiring them to pay the amount assessed upon them, the Board did, on the 3rd day of May, 1861, appoint the respondents, Samuel Collins and Thomas Howell, to make, and they accordingly made, a rate on the parish of St. Giles, Camberwell, for the said sum or instalment of 790*l.*, which is the rate appealed against.

15th. The appellants contend that the Board ought either to have apportioned and charged the whole of the 200,000*l.* amongst all the parishes comprised within the limits of the Metropolitan Commission of Sewers, at the time of the expiration of the 11 & 12 Vict. c. 112, according to the rateable value of the property in such parishes respectively, or if the Surrey and Kent Sewerage District was chargeable with, and liable to pay the 67,000*l.* charged thereon by the Board, that the Board in apportioning the amount of the 67,000*l.* amongst the respective parishes comprised in the said district, had power, under sections 170 and 181 of the Metropolitan Local Management Act, 1855, to apportion, and ought to have apportioned, the amount not only according to the rateable value of the property in the respective parishes comprised in the said district, but also to the benefit received by the respective parishes from the expenditure of the 67,000*l.*

It is agreed that the Court shall have power to alter or amend the rate.

The questions for the opinion of the Court are :—

Whether the rate so made by Samuel Collins and Thomas Howell is, under the circumstances, a valid rate ?

Whether, assuming it to be a valid rate, the Board had the power to apportion, or now have the power to re-apportion, the 67,000*l.* among the parishes comprised in the Surrey and Kent Sewerage District, according to the benefit received by the said respective parishes from the expenditure of that sum, or to apportion, or re-apportion, the 200,000*l.* among all the said parishes which at the time of the expiration of the 11 & 12 Vict. c. 112, were within the limits of the Metropolitan Commission of Sewers, according to the rateable value of the property in such parishes respectively.

If the Court decides that the rate is a valid rate,

then the appeal is to be dismissed; if otherwise, the appeal is to be allowed.

The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 181, enacts, that the money necessary to discharge the liabilities of the Metropolitan Commissioners of Sewers, shall be raised in like manner as the expenses of the Metropolitan Board of Works; and section 170 enacts, that the Board "shall from time to time ascertain and assess upon the City of London, and the other parts of the metropolis, the sums which, in their judgment, ought to be charged upon the said city, and such other parts respectively, for defraying the expenses of the said Board in the execution of this Act, having regard to the annual value of the property in the several parts of the metropolis, and having regard in the case of expenditure on works of drainage to the benefit derived from such expenditure by the several parts of the metropolis affected thereby; and any such sum may be so assessed, wholly or in part, in respect of expenses already incurred, or of expenses to be thereafter incurred; and for the purposes of such assessment the annual value of the property in such several parts shall be estimated according to the estimate or basis on which the county rate is assessed, or where there is no such county rate, according to a like estimate."

Lush, Q.C. (*Raymond* with him) for the respondents.

1st. The rate is valid, the apportionment being rightly made, without regard to the quantum of benefit derived,

Regina v. Head, 3 B. & S. 419; 32 L. J. M. C. 115; 1 N. R. 313.

And see

11 & 12 Vict. c. 112, ss. 34, 76, 81, 94, 95;

18 & 19 Vict. c. 120, ss. 111, 161, 164, 170, 181; and

25 & 26 Vict. c. 102.

2nd. Even if the rate be invalid, the apportionment is final, and the ground of appeal is not a good one.

Bovill, Q.C. (*Holl* with him), for the appellants.

According to the old sewers law, the rating was to be made only on those deriving benefit from the sewers,

Rez v. Tower Hamlets, 9 B. & C. 517.

The proviso in section 76 of 11 & 12 Vict. c. 112, expressly preserves this principle, and this was held, by Campbell, C.J., Coleridge, Erle, and Crompton, JJ., in

Metropolitan Board of Works v. Vauxhall Bridge Company, 7 El. & Bl. 964,

where the rule was laid down that rateability is to be in proportion to benefit. That case concludes the present point. The rate is bad, because no regard has been had to the amount of benefit.

Section 170 of the Metropolitan Local Management Act directs that regard is to be had, not only to the annual value of the property, but also to the benefit

derived from the expenditure by the several parts: and here "part" must mean at any rate "parish," if not street or house. It cannot mean merely "district." "District" in this Act means an aggregation of parishes.

As to levying rates according to the benefit derived under this Act, see

Hosell v. The London Dock Company, 8 El. & Bl. 212.

Regina v. Head was decided on section 164 of the Metropolitan Local Management Act, 1855. I rely on section 170, under which this rate is levied, and which expressly directs regard to be paid to the benefit derived.

Lush, Q.C., in reply.

In the *Vauxhall Bridge Case* no benefit at all was derived, and *Regina v. Head* decides that, if the property derive no benefit, then it is not to be rated; but if it derive any benefit, then it is to be rated, and the quantum of benefit is not to be considered.

See also,

Regina v. Goodchild, 27 L. J. M. C. 233;

Callis on Sewers, 222.

The opinion expressed in *Rez v. Tower Hamlets*, however weighty, was only extra-judicial, and cannot bind this Court. If the Board were compelled to apportion according to benefit, they must descend as low as every street, and even every house, and the Act never intended to throw this burden on them, and it would, indeed, be practically impossible.

Section 76 of 11 & 12 Vict. c. 112, does not apply to such exemptions as that contended for by the appellants, but to permanent exemptions. In *Regina v. Head*, the proviso as to exemptions in section 164 of the 18 & 19 Vict. c. 120, was brought to the notice of the Court, and was held not to limit the rateability of property to the proportion of benefit derived.

Cw. adv. vult.

25 FEB. 1865.

BLACKBURN, J., read the judgment of himself and COCKBURN, C.J. :—

This is a case stated on appeal against a rate made by the respondents, by virtue of an appointment made by the Metropolitan Board of Works, under the 168th section of the Metropolitan Local Management Act (18 & 19 Vict. c. 120), in consequence of the default of the vestry of St. Giles, Camberwell, to pay the amount required by a precept of the Metropolitan Board of Works. It appears from the statements in the case that the Metropolitan Commissioners of Sewers had, whilst acting under the 11 & 12 Vict. c. 112, borrowed the sum of 200,000*l.* Out of this sum they had expended 67,000*l.* on drainage works for the benefit of the Surrey and Kent Sewerage District. That district had been formed by them under the powers given in the 34th section of 11 & 12 Vict. c. 112. The district comprised parts of nineteen

* Crompton, J., went to Chambers before the conclusion of the argument.

different parishes, as is stated in the 7th paragraph of the case. On the passing of the Metropolis Local Management Act, the Metropolitan Board had to provide for the payment of the liabilities of the Metropolitan Commissioners of Sewers. The Metropolis Local Management Act (18 & 19 Vict. c. 120), section 181, directs that the money necessary to discharge the liabilities of the Metropolitan Commissioners of Sewers shall be raised in like manner as the expenses of the Board; and section 170 directs how these expenses of the Board are to be assessed. The Metropolitan Board, acting under these sections, have apportioned this sum of 67,000*l.* amongst the several parishes comprised in the Surrey and Kent Sewerage District, and it is not disputed that this was the correct course to take. But it appears from the statement of the case in paragraph 9, that the Metropolitan Board apportioned it amongst the several parishes comprised in that district according to the rateable value of the property in such parishes respectively, and not according to the proportion of the sum expended in such parishes respectively, or to the benefit derived by such parishes respectively from the expenditure; and, following this principle, the sum charged on the parish of Camberwell (St. Giles), in which the appellant's property lies, is 9000*l.*

It further appears from the case (paragraph 8 and paragraph 13) that the actual expenditure for works locally situate within that parish was only 519*l.*, and that the whole benefit derived, directly or indirectly, by the parish from the whole expenditure on drainage works amounts to a sum much less than 9000*l.*, and which for the purposes of the case is by paragraph 13 to be assumed to be 1,074*l.* 6*s.* 10*d.* The contention of the appellant is stated in the 15th paragraph; it is that the Board ought to have apportioned the amount having regard not only to the rateable value of the property in the respective parishes comprised in the district, but also to the benefit received by the respective parishes by the expenditure; and if he is right in this contention, no doubt the sum which has been assessed on the parish is very considerably larger than it ought to have been; and his counsel before us argued that the rate was in consequence bad upon appeal. The contention on the part of the respondents is that the Board had no power, or at all events were under no obligation, to enter into such an inquiry; and that no appeal was given against the apportionment by the Board, which, even if on a wrong principle, was final. This Court is called upon to determine judicially whether the rate made is a valid rate or not; which is the first question asked in the case.

Mr. Bovill, as counsel for the appellants, pointed out that in sect. 170 of the Local Management of the Metropolis Act (18 & 19 Vict. c. 120), the Metropolitan Board were directed, in apportioning the expenses of the Board amongst the different parts of the metropolis, to have regard to the annual value of the property in the several parts of the metropolis; and also

"in the case of expenditure on works of drainage, to the benefit derived from such expenditure by the several parts of the metropolis affected thereby"; but he chiefly relied on the argument that, according to the old law of sewers, the sewers-rate was to be only on those deriving benefit from the sewers, and he relied on the extra-judicial opinion delivered in the *Metropolitan Board of Works v. The Vauxhall Bridge Company* (*loc. cit.*) as an authority that, under the Metropolitan Sewers Act, 11 & 12 Vict. c. 112, the effect of the proviso at the end of section 76 was to preserve this old principle, which, according to the same authority, extended so far that, in making a sewers-rate, the amount to be imposed on each property should be apportioned to the benefit derived by that property from the expenditure.

Mr. Lush, in support of the rate, denied that the old rule of sewers law was, that in making a sewers-rate, different owners were to be assessed according to the proportion of benefit derived by their respective properties. He admitted that, according to the old law, no person could be assessed in respect of property which derived no benefit at all from the works, and also that the Commissioners of Sewers might, and, according to *Re v. Commissioners of Sewers for the Tower Hamlets* (9 B. & C. 517), ought to divide the limits of their commission into districts or levels so laid out that every part of each district or level should receive some benefit from the drainage works constructed for it; but he contended that all rates on the inhabitants of a level were to be made equally on all the inhabitants of such level. In the 170th section of the Metropolis Local Management Act, the words the "several parts of the metropolis" were, according to his contention, to be understood as meaning the several levels or districts in the metropolis. And he contended that, when the Commissioners of Sewers, acting under the 11 & 12 Vict. c. 112, s. 84, had formed a sewerage district (such as the Surrey and Kent Sewerage District), that was in the place of a district or level properly set out under the old Commissioners of Sewers, and that all rates to be imposed on the inhabitants of that district must be imposed equally on all the inhabitants according to the value of their property, without inquiring whether the amount of benefit derived by the several properties was equal or not. He did not dispute that the extra-judicial opinion given in *The Metropolitan Board of Works v. The Vauxhall Bridge Company* (*loc. cit.*), was adverse to this argument, but contended that the opinion there given had been given without sufficiently considering that it threw upon those imposing a rate the task of ascertaining what was the separate benefit derived by every property within the district from the works—a task which it would be quite impracticable for them to perform, and which had never been imposed upon them. He contended that the opinion there expressed was inconsistent with what is said in *Re v. The Commissioners of Tower Hamlets* (*loc. cit.*), and in *Regina v.*

Head (loc. cit.), that it was extra-judicial, and consequently not binding upon us. He further contended that the objection, if valid, could not be raised on appeal.

On the whole, we think that Mr. Lush's argument must prevail. Though we are not bound by the opinion expressed in *The Metropolitan Board v. The Vauxhall Bridge Company*, inasmuch as it was extra-judicial, the respect we feel for its authority makes us reluctant to decide in opposition to it. But we are not prepared to hold that the Metropolitan Board were bound to enter into an inquiry as to the amount of benefit derived by the different parochial divisions comprised within the sewerage district. The boundaries of the parishes were originally fixed without any reference whatever to the levels or drainage of

the district. If, therefore, the mode of apportionment was wrong, it must be because the inquiry ought to extend to the amount of benefit derived by each different street, or even each different house, within the district, an inquiry for which no machinery is provided. And we find no authority before the *Vauxhall Bridge Case* in which such an inquiry was thought to be required; and we do not think that the Metropolitan Board were at all events bound to make such an inquiry. It is, on this view of the case, unnecessary to inquire whether an appeal on such a ground as the present can or cannot be maintained. On the ground above indicated, we answer the first question in the case, and that only. We are of opinion that this rate is a valid rate.

Judgment for the respondents.

APPENDIX.

ORDER OF COURT.

TUESDAY, THE SECOND DAY OF AUGUST, 1864.

THE Right Honourable RICHARD BARON WESTBURY, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Honourable the Vice-Chancellor Sir RICHARD TORIN KINDERSLEY, and The Honourable the Vice-Chancellor Sir WILLIAM PAGE WOOD, Doth hereby, in pursuance and execution of the powers given by the Statute 15th and 16th Victoria, Chapter 86, and of all other powers and authorities enabling him in that behalf, order and direct in manner following :—

I.

All applications made under the Statute 6th and 7th Victoria, Chapter 73, to refer any Bill of any Attorney or Solicitor of his fees, charges, and disbursements, for any business done by such Attorney or Solicitor, to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, or for any or either of those purposes, shall hereafter be made to a Judge at Chambers by Summons, instead of by Special Petition to the Court, except applications for orders of course, which are to be made as heretofore.

II.

The Rules numbered respectively 35 and 36 of the 40th of the Consolidated General Orders of the Court of Chancery are hereby abrogated.

III.

Any party who may be dissatisfied with the certificate of the Taxing-Master, as to any item, or part of an item, which may have been objected to, as in the 33rd Rule of such 40th Order mentioned, may apply to the Judge by whom the order for taxation shall have been made, for an order to review the taxation, as to the same item, or part of an item; and such application shall be made by a Summons at Chambers, and such Judge may thereupon make such order as to the Judge shall seem just. But the certificate of the Taxing-Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

IV.

Such application shall be heard and determined upon the evidence which shall have been brought in before the Taxing-Master; and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct.

WESTBURY, C.

RICHD. T. KINDERSLEY, V.-C.

W. P. WOOD, V.-C.

END OF VOL. V.

